United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1107

To be argued by
JAMES P. LAVIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1107

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANGELO BERTOLOTTI, JAMES CAPOTORTO, JOSEPH CAMPERLINGO, RAYMOND THOMPSON, JOSEPH DE LUCA, JAMES ANGLEY and LOUIS GUERRA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Angelo Bertolotti, James Capotorto, Joseph Camperlingo, Raymond Thompson, Joseph DeLuca, James Angley and Louis Guerra appeal from judgments of conviction entered on March 4 and 20, 1975, in the United States District Court for the Southern District of New York, after a four-week trial before the Honorable Robert L. Carter, United States District Judge, and a Jury.

Indictment 75 Cr. 5 filed on January 6, 1975, charged the seven appellants and twenty-two others—Ernest Coralluzzo, a/k/a Jake, Albert Rossi, Jr., Robert Browning, a/k/a Bobby Gooch, Franklin Flynn, Roger Silverio, a/k/a Ricky, a/k/a Doug, Angelo Iacono, Webster Eugene Bivens, a/k/a Gene, Vincent Artuso, Steven Crea, Joseph Lepore, Gerald

Rubin, a/k/a Jerry, Charles Guida, a/k/a Charlie Chase, Peter Cosme, a/k/a Inky, Phillip Cimmino, a/k/a Philly Rags, Anthony De Pasqua, a/k/a Boots, Thomas Vasta, Maria Marrero, Susanna Sherman, Marilyn Greco, Anita Coralluzzo, Cathy Spangler, and Nathaniel Arnold, a/k/a Willie Lump Lump—in nine counts with various violations of the federal narcotics laws.*

Count One charged all twenty-nine defendants and a named co-conspirator, Louis Lepore,** with conspiracy to violate the federal narcotics laws commencing on January 1, 1973 and continuing until January 6, 1975, the date of the filing of the Indictment.

Count Two charged Ernest Coralluzzo, a/k/a Jake, Joseph DeLuca, and Robert Browning, a/k/a Bobby Gooch, with distributing and possessing with the intent to distribute twelve (12) kilograms of cocaine on September 23, 1973. Count Three charged Vincent Artuso and Steven Crea with distributing and possessing with the intent to distribute approximately two kilograms of cocaine in November of 1973. Count Four charged Louis Guerra with distributing and possessing with the intent to distribute approximately one kilogram of cocaine in October of 1973. Count Five charged Anthony DePasqua, a/k/a Boots, Phillip Cimmino, a/k/a Philly Rags and Joseph Lepore with distributing and possessing with the intent to distribute approximately one kilogram of cocaine in November of 1973. Count Six charged Anthony DePasqua, a/k/a Boots, with distributing and possessing with the intent to distribute approximately one-quarter of a kilogram of cocaine in November of 1973. Count Seven charged Peter Cosme, a/k/a Inky, with distributing and possessing with the intent to distribute approximately one-half of

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* Indictment 75 Cr. 5 superseded Indictment 74 Cr. 620, filed June 18, 1974. Both indictments were substantially identical.

** Louis Lepore pled guilty to Indictment 74 Cr. 620.

a kilogram of cocaine in October of 1973. Count Eight charged Maria Marrero with distributing and possessing with the intent to distribute approximately one-half of a kilogram of cocaine in November of 1973. Count Nine charged Nathaniel Arnold with distributing and possessing with the intent to distribute approximately one-half of a kilogram of cocaine in December of 1973.

Trial commenced on January 7, 1975 as to eighteen defendants.* During the selection of a jury a severance was granted to the defendant Marrero.** On January 30, 1975, the jury on Count One, the conspiracy count, found the seven appellants guilty and acquitted Bivens, Crea, Joseph Lepore, Cimmino, Vasta, Sherman, Anita Coralluzzo and Arnold. The jury also acquitted the appellants Guerra and DeLuca on Counts Four and Two, respectively. The jury was unable to reach a verdict as to the defendants Greco and Spangler.

On March 4 and 20, 1975 Judge Carter sentenced each defendant to a term of five years imprisonment to be followed by a term of special parole of three years. In addition, each was fined $5,000, except Camperlingo who was fined $10,000.

All appellants except Capotorto are at liberty pending this appeal. On June 10, 1975, following a hearing before Judge Carter, defendant Capotorto's bail was revoked and he was remanded.

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* The defendants Ernest Coralluzzo, Robert Browning, Gerald Rubin, and Charles Guida pled guilty prior to trial. Rossi entered a plea of guilty to Count One on January 7, 1975 and testified at trial for the Government. Six other defendants—Franklin Flynn, Roger Silverio, a/k/a Ricky, a/k/a Doug, Angelo Iacono, Vincent Artuso, Peter Cosme, a/k/a Inky, and Anthony De Pasqua, a/k/a Boots, were unavailable for trial.

** Marrero later testified at trial as a Government witness, after having pled guilty to an Information charging her with using a telephone to further a narcotics conspiracy.

Statement of Facts

The Government's Case

1. Introduction: Nature of the conspiracy and roles of the appellants and other co-conspirators.

The evidence at trial established that from on or about January of 1973 to May 1974 the appellants, together with their co-defendants and co-conspirators, were engaged in a conspiracy to distribute large amounts of cocaine and heroin in New York and Florida. Rossi and Coralluzzo, two of the core members, obtained cocaine from, among others, appellant Louis Guerra and defendant Franklin Flynn, and employed the services of appellants Angley and DeLuca and their co-conspirators and co-defendants, Browning, Louis Lepore, Guida, Marrero, Spangler, Greco and Pearson, who assisted in storing, diluting, repackaging and delivering cocaine and heroin to numerous customers, including appellants Capotorto, Camperlingo, Bertolotti, Thompson, Guerra and co-conspirators Rubin, Cosme and John Serrano.* Additionally, some of the conspirators both purchased and sold narcotics within and without this circle of conspirators. Thus Guerra sold cocaine to Rossi and Coralluzzo and purchased cocaine from them. Guerra also bought heroin from and sold cocaine to Pearson, and Pearson bought cocaine from Rossi and Coralluzzo which he resold to his customers including defendant Cosme. And Capotorto both purchased narcotics for his partners and assisted Rossi and Coralluzzo in arranging other heroin transactions.

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* Rossi, Pearson, Marrero and Serrano testified for the Government.

2. The core group: Rossi, Coralluzzo, and their associates.

Albert Rossi testified that in 1969 he began dealing in narcotics with various individuals in the Bronx. In the fall of 1972 he was approached by co-conspirator John DiSalvo who asked Rossi to supply an eighth of a kilogram of heroin. Rossi obtained the heroin for DiSalvo, who later informed Rossi that the people to whom DiSalvo sold the narcotics were unhappy with the quality. Rossi met with DiSalvo's customers, one of whom was defendant Ernest Coralluzzo, in front of the Magic Carpet Lounge in the Bronx in the winter of 1972. Coralluzzo and Rossi came to terms regarding the heroin and subsequently became good friends (Tr. 143-164).*

In January or February of 1973, in an attempt to locate some cocaine or marijuana for their personal use, Coralluzzo introduced Rossi to defendant Louis Guerra at Guerra's Bronx apartment, where Guerra informed them that he was awaiting a shipment of cocaine (Tr. 164-165).

In March of 1973 Rossi went to Florida and while there he agreed to sell two kilograms of cocaine to co-conspirator Greg Samuels. Rossi telephoned Guerra in New York and told him that James "Lump Lump" Lombardi was coming to New York and that Guerra should meet Lombardi at the airport and give Lombardi two "female Italian suits" or two "apartment buildings".** Rossi also told Guerra Lombardi's flight number and arrival time. Lombardi went to New York and returned to Florida that same day with two kilograms of cocaine which he gave to Rossi. The cocaine, however, was not sold and Rossi and Coralluzzo

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* "Tr." refers to the trial transcript; "GX" to Government's Exhibits; "DX" to defendants' exhibits; "Br." to the brief of the specified defendant and "App." and "S. App." to the combined appendix and supplemental appendix of the defendants.

** Code words for kilograms of cocaine (Tr. 168).

returned the two kilograms to Guerra in New York a few days later.* Guerra told them that he would not have a problem getting rid of the cocaine but complained that the packages were a little short (Tr. 166-171, 704-708).

After this, in the spring of 1973, defendant Capotorto and co-conspirator Salvatore Ripulone introduced Rossi and Coralluzzo to a Williard Williams at the Oasis Bar located at 148th Street and Broadway. At that meeting Rossi gave Williams one or two ounces of cocaine. Through Williams, Rossi and Coralluzzo met co-conspirators Harold Harrison and Frank Matthews. Rossi, Coralluzzo, Capotorto and Ripulone began negotiations for thirty to fifty kilograms of heroin which Rossi and Coralluzzo said they could supply. During meetings at the Oasis Bar and later at the Cellar Bar on 95th Street and Columbus Avenue, Harrison and Matthews told Coralluzzo, Rossi and Capotorto that they were getting together the money for the purchase.** Coralluzzo, as a goodwill gesture, offered himself, Rossi or Capotorto as a hostage to safeguard the money (Tr. 347-348, 351-356). Matthews finally told Rossi that he could not afford to buy fifty kilograms but agreed to purchase a lesser amount. He then delivered $250,000

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* Notwithstanding that Samuels never received the two kilograms of cocaine promised, Rossi retained the $36,000 paid to him by Samuels for those drugs (Tr. 478).

** In the early morning of May 17, 1973, Special Agent Harris observed Capotorto and two other white males leaving the Oasis Bar at 148th St. and Broadway and entering a car with Florida license plates which Harris followed for a short distance. Harris returned to the Oasis Bar and observed Williard Williams in a car parked outside. At 8:30 that evening Agent Harris and another agent went to the Cellar Bar at 95th Street and Columbus Avenue where Harris saw Capotorto and Salvatore Ripulone parked outside. Ripulone entered the Cellar Bar and a short while later Agent Harris followed him. As he did so Ripulone came out passing Agent Harris who continued inside the bar where he observed Williard Williams (Tr. 1527-1530).

to Rossi at Rossi's mother's house. Another $125,000 was delivered by Harrison. Capotorto and Ripulone counted $125,000 of the money which was in fives and tens. Although originally they intended to obtain the heroin for Matthews, Rossi and Coralluzzo decided not to go through with the deal, but rather to keep the $375,000 for themselves. Subsequently, they returned the money to Matthews and Harrison after they discovered that Capotorto was being held hostage (Tr. 348-350, 356, 669-675).*

In late May or early June 1973 after they had returned Matthews' money, Rossi and Coralluzzo met with defendants Capotorto and Thompson at Ripulone's house in New York. Capotorto stated that he, Thompson, Camperlingo and Bertolotti had pooled their money and had raised $17,000-$19,000 with which to buy a kilogram of cocaine and that he and Thompson had been sent to New York for that purpose.** Rossi then telephoned Guerra and told him that people had come up from Florida with money to buy a kilogram of cocaine. Guerra said he was unable to get to his stash immediately and that it would take a day to get the cocaine. The following day Guerra arrived at Rossi's mother's house at 2007 Narragansett Avenue in the Bronx. When Rossi observed Guerra's car enter the block he asked Capotorto, Thompson and Ripulone to wait outside the house in Capotorto's car. Guerra then entered with an attache case containing two kilograms of cocaine, one of which was pure and one diluted. Guerra asked Rossi and Coralluzzo to try to persuade their customers to take the diluted as well as the pure kilogram of cocaine. After Guerra left, Rossi called Capotorto, Thompson and Ripulone back inside and showed them the

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* Guerra and co-conspirator Peter Mengrone discussed Capotorto's detention by Matthews and Harrison during a conversation over Mengrone's wiretapped telephone (S. App. 61, 150-154).

** Rossi did not know Thompson, Camperlingo or Bertolotti prior to this meeting but did of course know Capotorto (Tr. 172).

cocaine. Thompson opened one of the packages, snorted some of the cocaine and said it looked like the real thing. Capotorto and Thompson said they would not have any trouble in disposing of the second, diluted kilogram. Thompson then handed Rossi or Coralluzzo $17,000-$19,000 in payment for the pure kilogram and then Thompson and Capotorto took the two kilograms and returned to Florida. The following day Rossi and Coralluzzo, after taking $2,500-$3,000 each for themselves, gave the remainder of the $17,000-$19,000 to Guerra at his house in partial payment for the two kilograms (Tr. 170-175).*

In June of 1973 Rossi and Coralluzzo traveled to Fort Lauderdale, Florida in an attempt to collect the rest of the money still owed them on the cocaine. When they arrived, Rossi arranged a meeting at the Jolly Roger Hotel which was attended by Capotorto, Thompson, Rossi and Coralluzzo. Thompson said that they were having difficulty getting rid of the cocaine since it could not be injected because it clogged the needle. After some argument Thompson gave Rossi and Coralluzzo $5,000 which they divided (Tr. 176-179, 532-533). Later that month or in July, Rossi and Coralluzzo met with Camperlingo, Bertolotti, Thompson and Capotorto in Camperlingo's Florida home to discuss the cocaine matter as well as the importation of a large quantity of marijuana. Bertolotti, Camperlingo and Thompson stated that the cocaine they had received in May or June from New York was "sniffing cocaine and that they were having a problem with it" (Tr. 325). It was finally agreed that if Bertolotti, Thompson and Camperlingo could get 500-600 pounds of marijuana, Rossi and

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* Rossi and Coralluzzo were at Guerra's apartment on another occasion when Guerra showed them an automobile tire which had been cut open. Guerra explained that he had received cocaine from California which had been secreted in the tire which was kept in the trunk of a car (Tr. 175-176).

Coralluzzo would take the marijuana and credit its price against what was still owed on the two kilograms of cocaine. Thompson left the meeting and Coralluzzo, Rossi, Capotorto, Camperlingo and Bertolotti continued to discuss the marijuana and the problem of what to do with the remainder of the cocaine (Tr. 321-326, 532-537). Rossi testified that at one point in the conversation Camperlingo and Bertolotti stated:

> "that they laid out a lot of money for this cocaine and what were they going to do with it, and if we were getting any other cocaine would we do something with this coke, to throw in with the coke" (Tr. 326).

In August, again at Camperlingo's home, Rossi met again with Capotorto, Camperlingo, Bertolotti, Thompson, Louis Lepore and a Nicholas DiGeorgio, where the group discussed transportation of the marijuana, which was then offshore on a boat, to New York and the difficulty in disposing of the cocaine.

Later, in Florida, after Thompson got the marijuana ashore, Bertolotti, Thompson and Camperlingo told Rossi to take the marijuana to New York. Rossi, Louis Lepore, Capotorto and DiGeorgio drove a camper containing 600 pounds of marijuana from Florida to the Bronx. When they arrived Louis Guerra was contacted and he and defendant Browning drove the camper to West Milford, New Jersey, where Guerra had rented a house. Guerra, Capotorto, Rossi and Browning unloaded the marijuana at West Milford, where some of it was distributed. Guerra took 100 pounds (Tr. 327-333).

In September of 1973 Camperlingo came to New York and met with Rossi, Capotorto and defendant Charles Guida in Guida's Bronx apartment. Camperlingo complained that he was owed money on the marijuana but finally agreed to take 125 pounds of it back. Camperlingo,

however, still wanted to talk with Coralluzzo, so a meeting was arranged in the Cafe Serrano on Grand Street in lower Manhattan, which was attended by Rossi, Coralluzzo, Camperlingo and Louis Guerra. Camperlingo and Coralluzzo again discussed the payment for the marijuana (Tr. 337-339).

A. The theft of the Flynn cocaine

During one of his trips to Florida during July or August of 1973 Rossi had met with defendant Angelo Iacono, whom Rossi had known previously in New York. Iacono stated that his partner, defendant Franklin Flynn, had connections in South America capable of supplying large amounts of cocaine. A meeting was soon arranged between Rossi and defendants Flynn, Iacono, Roger Silverio and Capotorto at the B & G Lounge in Fort Lauderdale. Flynn told Rossi that although he could get vast amounts of cocaine, he was fairly new in the business and did not know of anyone to whom he could sell. Rossi told Flynn that he would take all the cocaine that Flynn could get (Tr. 185-188).

Rossi went back to New York and in late August or early September, 1973, he received a telephone call from Flynn who told Rossi that Iacono was coming to New York with the cocaine. Rossi, Capotorto and Charles Guida met Iacono at Kennedy airport and drove him to the Van Courtlandt Motor Inn in the Bronx where Iacono produced an ounce of cocaine which he told Rossi was of the quality Rossi could expect to receive. Rossi had the sample tested and Iacono returned to Florida. Shortly after this, in September of 1973, Rossi received another telephone call from Flynn who stated the cocaine was in and that Rossi could come to Florida to pick it up (Tr. 190-194).

After Flynn's telephone call Rossi telephoned Coralluzzo and relayed Flynn's message. Coralluzzo told Rossi that he would get in touch with defendants Robert Browning,

Louis Lepore, James Angley, Joseph DeLuca and co-conspirator Gary Pearson, all of whom were to go on the trip to Florida. Rossi testified that shortly before the trip the group was present in his mother's house in the Bronx where he and Coralluzzo told the others that they were going down to Florida to rob the cocaine from Flynn and that each person was to receive $7,500, except DeLuca who was to get $5,000.*

On September 22, 1973, the seven individuals, Rossi, Coralluzzo, Pearson, Browning, Angley, Louis Lepore and DeLuca, went to La Guardia airport where they boarded a flight to Fort Lauderdale on tickets supplied by Rossi, all of which were in fictitious names (Tr. 195-198, 913-917).

The group arrived in Fort Lauderdale on September 22, 1973, and Pearson, DeLuca, Browning and Angley obtained rooms at the Hotel Diplomat while Rossi, Coralluzzo and Louis Lepore went to the Hemisphere Hotel. Coralluzzo, Rossi, Pearson and Louis Lepore then met with Flynn at the Diplomat Hotel where Flynn promised the cocaine and provided a sample (Tr. 201-302, 917-924).

The following day Rossi again called Flynn and arranged another meeting, this time at the B & G Lounge. At the meeting Flynn, accompanied by Iacono and Roger Silverio, insisted that he would not deliver the cocaine without first receiving payment. After a somewhat violent argument Coralluzzo and Rossi finally got Flynn to agree to deliver the cocaine that night at the Hotel Diplomat.

Rossi, Coralluzzo and Lepore then went to the Hemisphere Hotel, checked out and returned with their luggage to the Diplomat Hotel where they placed it in one of the two adjoining rooms, numbers 1049 and 1051, that Pear-

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* Pearson did not recall being present at such a meeting but stated he was told of the plan on the flight down to Florida (Tr. 1033-1038).

son, DeLuca and Browning had rented.* Pearson testified that he then waited in the hotel parking lot for Flynn and his partners to arrive. When they did, he informed Rossi, and then went over to Flynn's car where he observed Flynn remove a suitcase from the trunk and, accompanied by Iacono, take it into the motel room where Coralluzzo, Rossi and the others were waiting (Tr. 926-927). When Flynn entered the room he stated that he had the cocaine. Rossi then sent one of his group to get Silverio, who had remained outside with Pearson. Then Rossi, Coralluzzo and the others drew their revolvers and told Flynn and Iacono that they were going to steal the cocaine. Rossi told Browning and DeLuca to bind Flynn and Iacono. Pearson at this point arrived at the room with Silverio at gunpoint and Silverio was also bound. While the three were being bound Rossi and Coralluzzo took the suitcase containing the cocaine out to Flynn's car where it was placed in the trunk. Coralluzzo, Rossi, Pearson and Louis Lepore then waited in Flynn's car until Browning and DeLuca had finished tying up Flynn, Silverio and Iacono. When they arrived, the six drove in Flynn's car to a Holiday Inn in Fort Lauderdale where they transferred the cocaine and their personal suitcases to a waiting chauffeured limousine.** The six then were driven to West Palm Florida where Browning, DeLuca and Pearson were dropped at one hotel, while Rossi, Coralluzzo and Louis Lepore stayed at another.

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* Angley had returned to New York on business earlier that day (Tr. 205).

** Alfonso M. Marino testified that on September 24, 1973 he was chief of security for the Diplomat Hotel in Hollywood, Florida and that on that day a wallet was found in the area of Rooms 1049 and 1051 (GX 78, 79, 80) which contained identification in the name of Franklin Flynn and other papers, among which was a list of telephone numbers including the number of defendant Capotorto (Tr. 1460-1466; GX 80).

The following day, while still in Florida, Rossi called up defendant Marilyn Greco and told her to meet them with a limousine at Kennedy Airport. Rossi, Coralluzzo, Browning, Pearson, DeLuca and Louis Lepore then flew from the West Palm Beach Airport to New York on September 24, 1973, with the suitcases containing the guns and cocaine in the baggage compartment (Tr. 206-213, 747, 927-930). When the group arrived at Kennedy Airport they were met by defendants Marilyn Greco and Cathy Spangler. DeLuca and Browning picked up the baggage containing the guns and cocaine while Louis Lepore and Pearson checked the airport to determine if there were police in the area. While they did this Coralluzzo, Rossi, Spangler and Greco proceeded in the limousine to Rossi's mother's house at 2007 Narragansett Avenue in the Bronx. DeLuca and Browning picked up the cocaine and took a taxi to Narragansett Avenue, where the suitcases containing the cocaine were transferred to Rossi's limousine. Rossi, Coralluzzo, Greco and Spangler were then driven to Greco's house at 113-115 Heights Drive in Yonkers. After arriving Rossi and Coralluzzo instructed Greco and Spangler to purchase heavy duty plastic bags and a heat sealing machine (Tr. 213-214, 933).*

While Greco and Spangler were getting the plastic bags and heat sealing machine, Rossi telephoned defendant

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* Joseph Cardoza, the chauffeur of the limousine, testified that in September of 1973 he picked up two female passengers at 113-115 Heights Drive in Yonkers and drove them to Kennedy Airport where two males, whom he heard address each other as Al and Ernie, were picked up. Cardoza then drove back to New York, stopping first at a Korvettes and then at a street in the Bronx where Al picked up two suitcases and put them in the trunk of the limousine. He then drove the four to 113-115 Heights Drive where all the passengers got out and entered the house. About ten minutes later the two females came out of the house and he drove them to a department store in Yonkers where the two passengers went in and came out carrying two big bundles. He then drove them back to 113-115 Heights Drive (Tr. 1608-1623).

Gerald Rubin and asked him to come over to test the cocaine. Rubin arrived with another individual and performed various tests on the cocaine. After he finished he told Rossi and Coralluzzo that it was the best cocaine he had ever seen. Rubin received an ounce of the cocaine for his services and told Rossi and Coralluzzo that he could get rid of all the cocaine (Tr. 215-218).

After Rubin left, Rossi, Coralluzzo, Spangler and Greco repackaged the cocaine using the plastic bags and sealing machine purchased by Greco and Spangler. When they finished repacking they ended up with 26 to 28 15-ounce packages of cocaine,* which were later placed in the attic of Greco's house (Tr. 218-220, 1684-1686).

Pearson testified that after he observed DeLuca and Browning leave the JFK Airport he and Louis Lepore took a taxi to the Bronx, where they switched cabs before going to Rossi's mother's house. When they arrived, Pearson saw Rossi, Coralluzzo, and Greco drive by in the limousine and was told by DeLuca that the limousine was going to Greco's house. Pearson later that day went to Greco's house in Yonkers where he observed that all of the cocaine had been taken out of the suitcases. Pearson asked Rossi and Coralluzzo for his $7,500 fee, but agreed to accept a half kilogram of cocaine as payment in kind. When Rubin arrived Pearson left with what was supposed to be the half kilogram,** after arranging with Rossi and Coralluzzo that each future half kilogram would cost him $10,000 (Tr. 931-936).

Rossi and Coralluzzo later paid the rest of the group their agreed upon fees for the Flynn theft. Louis Lepore

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* Approximately twelve kilograms.

** It later turned out to be only about eleven ounces, which Pearson sold on two different occasions to defendant Cosme for a total of $6,000 (Tr. 936-938).

received $4,000-$5,000 in cash and the rest of his $7,500 fee in cocaine. Browning received about $500 in cash and the remainder of his fee in cocaine. DeLuca received $2,000-$3,000 in cash and some cocaine for his $5,000 fee. Angley, although he had returned to New York before the theft from Flynn, received three to four ounces of cocaine (Tr. 223-226). DeLuca, Browning, Louis Lepore and Pearson had also received $500 as expense money before leaving Florida (Tr. 929-930).

Approximately one week after the cocaine was delivered to Marilyn Greco's house, Coralluzzo told Rossi that it might not be wise to keep all of the cocaine in one location. He suggested moving ten of the packages to his mother-in-law's. Rossi agreed and he and Coralluzzo removed ten 15-ounce packages of pure cocaine from Greco's attic. Coralluzzo delivered those to his wife, Anita Coralluzzo, in Yonkers, telling her to take it to her mother's house (Tr. 221-223).

In September and early October 1973 Rossi and Coralluzzo began distributing the Flynn cocaine. A kilogram was sold in September to defendant Rubin, for $20,000. Rubin was later given a second kilogram which he subsequently returned unsold (Tr. 228-231). During the same period Rossi and Coralluzzo agreed to sell a kilogram to Louis Lepore for $20,000, who was in turn going to sell it to his customers. Rossi gave two 15-ounce packages to DeLuca and instructed him to deliver the cocaine to Louis Lepore.* DeLuca later that evening telephoned Rossi and said he had made the delivery. That same night Rossi and Coralluzzo received $10,000 from Louis Lepore at his apartment and the remaining $10,000 the next day at Marilyn Greco's house (Tr. 232-239). During September and October of 1973 Pearson sold to defendant Peter Cosme two half kilo-

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* Rossi and Coralluzzo decided that because of the purity of the cocaine their kilograms would contain only 30 ounces (Tr. 236).

grams of the Flynn cocaine, which Pearson had obtained from Rossi. He received $12,000 for first half kilogram and Pearson in turn gave Rossi $10,500, which Rossi divided with Coralluzzo. A week later Pearson sold Cosme the second half kilogram package for $12,000, of which Rossi again received $10,500 (Tr. 249-252, 937-941).

During the end of September or the early part of October 1972 Rossi telephoned Guerra and informed him that he and Coralluzzo had cocaine available. Guerra said he would take a kilogram. Coralluzzo and Rossi thereafter went to Guerra's apartment, which at that time was located on Yates Avenue in the Bronx, and gave Guerra two of the 15-ounce packages of cocaine. Guerra weighed the cocaine on a scale in his den, opened one of the packages, and stated that he could move the cocaine and would have payment in a day or so. Shortly after this Rossi and Coralluzzo returned to Guerra's apartment and were paid $10,000 in cash (Tr. 243-244, 651-655).

B. Rossi and Coralluzzo as fugitives: Distribution of the remainder of the Flynn cocaine

On October 25, 1975 Rossi and Coralluzzo found out that they had been indicted by the Bronx County District Attorney's Office on narcotics charges and that warrants had been issued for their arrest. The following day Rossi called up Marilyn Greco and told her that Cathy Spangler and Maria Marrero would come to her house to pick up the cocaine. Rossi then called Cathy Spangler and told her to pick up the cocaine from Marilyn Greco and to deliver it to a meeting place in Yonkers (Tr. 254-256).

Maria Marrero testified that she was at Susanna Sherman's house when a call came in for Cathy Spangler. After Spangler finished the call she and Marrero drove to Marilyn Greco's house in Yonkers where Greco and Spangler went upstairs while Marrero waited in the living room. Spangler

at one point came down to answer the phone but went back upstairs. A few minutes later Spangler came back down and she and Marrero drove to a Chinese restaurant in Riverdale where they were met by Rossi and Coralluzzo in a car driven by defendant Angley. Spangler got out of her car and talked to Coralluzzo and Rossi. After the conversation she got back in and she and Marrero followed Angley, Coralluzzo and Rossi to another part of the Bronx where Angley again stopped. Coralluzzo or Rossi came over to Spangler's car and again asked her to step out. Spangler did so and walked towards Angley's car where Marrero momentarily lost sight of her. She returned in a few minutes and told Marrero that they were going back to New York (Tr. 1411-1418).

Rossi testified that he recalled Spangler getting out of the car with, he believed, Marrero, and that Spangler gave him a small white valise which she opened and which she said contained the goods. Rossi put the valise containing the cocaine in the trunk of Angley's car and he, Angley and Coralluzzo went to a girl's apartment and stored the cocaine in the bathroom (Tr. 254-258).*

Rossi and Coralluzzo then called Coralluzzo's brother-in-law, known to Rossi by the alias, "Sally Goose". Rossi and Coralluzzo each spoke to "Sally Goose" and told him that they were going to leave the cocaine with him and that he was to await either Rossi or Coralluzzo's further instructions. Angley, Coralluzzo, Rossi and Cathy Spangler then left the following day for the Jersey Shore. They remained overnight at a Holiday Inn and later Rossi and Coralluzzo stayed at other locations in New Jersey during the time they were fugitives. During that time they

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* Maria Marrero did not recall any valise carried by Spangler but only a large shoulder bag (Tr. 1450).

continued their narcotics activities by having defendant Angley and others pickup cocaine from "Sally Goose" and deliver it to their customers (Tr. 258-261, 264-265).

On one occasion Angley gave Rossi and Coralluzzo $2,500 and told them that he had sold an eighth of a kilogram of cocaine. Angley at another time sold another eighth of a kilogram of cocaine and picked up from another person money owed to Rossi and Coralluzzo from an earlier cocaine transaction (Tr. 256-260, 264-268). On another occasion Anita Coralluzzo brought Rossi and Ernest Coralluzzo $7,000 which she said she had received from Angley (Tr. 277-278).

During this same period of time Maria Marrero told Rossi and Coralluzzo that she and an individual, whom she introduced as "Carey", could sell a kilogram of cocaine in Boston.* Rossi and Coralluzzo gave the kilogram to Maria Marrero, Carey and a friend of Coralluzzo's, Pat Croce. In Boston Marrero sold only one half of the kilogram. She gave the remaining half kilogram and the proceeds from the sale to Croce who returned to New York and handed the cocaine and money over to Rossi. Marrero remained in Boston (Tr. 274-276, 1421-1426).

On November 18, 1973, Rossi and Coralluzzo surrendered to the Bronx District Attorney's Office. They soon made bail and continued their narcotics activities (Tr. 279-280).

In late November Rossi gave a quarter of a kilogram of cocaine to DeLuca and instructed him to deliver it to Carey at 86th Street and Third Avenue in Manhattan. Rossi subsequently received a phone call from DeLuca who said Carey wanted the cocaine without first paying for it. Rossi refused and told DeLuca to hold the cocaine until the next day. The following day Rossi told DeLuca

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* "Carey's" true name was Arnoldo Diaz (Tr. 1421).

to give the cocaine to a "Sal" who later delivered it to Rossi (Tr. 281-285). Defendant Guida also made deliveries of cocaine for Rossi during this period (Tr. 289-293).

In December of 1973, Rossi was told by Coralluzzo that DeLuca had delivered two kilograms of cocaine to Vincent Artuso at a bar in the Bronx. Rossi and Coralluzzo later received $9,000 in payment from Artuso at a Bronx club and $5,000 on another occasion (Tr. 302-307).

In December of 1973 Rossi was in a social club at 188th Street in the Bronx when he was approached by Coralluzzo, Angley and DeLuca. Coralluzzo told Rossi that Angley had a customer * who wanted to buy a kilogram of cocaine. After hearing the details Rossi told Coralluzzo to forget about the deal and Coralluzzo agreed that he would. Nonetheless, Coralluzzo decided to supply the cocaine and later that same night defendant Charles Guida came to the club and told Rossi that earlier in the evening Coralluzzo had asked Guida to deliver some narcotics. Guida told Rossi that he had used Rossi's 1973 black Thunderbird and that Angley had followed him in another car. Guida also told Rossi that during the transaction he had seen what he believed were agents so he escaped and drove to Long Island where he parked Rossi's car. Guida stated to Rossi that he had then taken a cab to the Bronx and dropped off the person who had been in the car during the deal before going to his own car where he placed the kilogram of cocaine. After hearing Guida's story, Rossi telephoned Marilyn Greco and asked her and her son to come to the club. When they arrived Rossi asked the son to take a cab to Long Island to pick up his Thunderbird and then Rossi asked Marilyn Greco to take the kilogram of cocaine to her house (Tr. 308-313).

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* Angley's customer was John Serrano. The latter's testimony regarding this transaction (see pp. 20-21, *infra*) was the same as Rossi's in all material respects.

C. John Serrano's role

John Serrano stated that during 1973 he had approximately six cocaine transactions with Angley, each involving about an ounce, for which he had paid Angley $600-$700 each. Most of the transactions took place in a parking lot to the rear of Angley's Bronx residence (Tr. 1104-1106).

On December 9, 1973 Serrano and Angley met in the parking lot behind Angley's house where Serrano asked Angley to supply two kilograms of cocaine. Angley said he could deliver the two, but only one at a time, for which the price would be $27,500 per kilogram. Angley also agreed to supply an ounce sample of the cocaine to Serrano for $1,000 the following night outside the Chaparral Lounge in the Bronx. Serrano went to the Chaparral Lounge the next night but Angley never appeared. Serrano then drove to Zerega Avenue where he met Angley who told Serrano to go back to the Lounge and wait. Serrano did so and Angley later that night arrived at the Lounge and gave Serrano an ounce of cocaine contained in a cigarette box. Serrano then left, gave the ounce to his customer, Roberto, and returned to Angley with the money (Tr. 1112-1117, 1276-1290; GX 1).* The following day Serrano telephoned Angley and told him that he wanted the kilogram of cocaine. The transaction was arranged for 9:00 p.m. that night (Tr. 1117-1119, 1151-1157). At the appointed time Serrano picked up Roberto and his friend, Jesse (DEA undercover Agent Jesus Muniz). Muniz showed Serrano the $27,500 for the kilogram and then Serrano and Roberto went to meet Angley at Zerega Avenue, but again Angley did not appear (Tr. 1119-1121, 1157-1160).

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* Roberto was a DEA informant and the transaction was under the surveillance of DEA Special Agents (Tr. 1151-1157).

The following day, December 12, 1973, Serrano telephoned Angley and arranged a meeting at the Crosstown Diner at 6:00 p.m. Angley at the meeting told Serrano that the transaction would take place that night and that he would be followed by a person in another car who would actually have the kilogram. Serrano was told to enter that second car when it arrived (Tr. 1109-1111, 1121-1122).

That night Serrano met with undercover agent Muniz and Roberto and the three then proceeded to the Crosstown Diner. A short time after they arrived Angley drove by in his car followed by a black Ford Thunderbird. Both Angley's car and the Thunderbird stopped and Serrano and Roberto got out of their car and entered the Thunderbird. The driver of the Thunderbird then drove around while Roberto tested the cocaine. They then went back to the diner where Roberto got out of the car to get the money and as he did so DEA surveillance agents approached the Thunderbird to arrest Serrano and the driver, who upon seeing the agents sped away and escaped (Tr. 1123-1125, 1159-1161, 1172-1175).*

D. Pearson's dealings with Guerra

Pearson's testimony confirmed his participation in the trip to Florida with Rossi and the others in September of 1973 which resulted in the seizure of the 12 kilograms of cocaine thereafter distributed by and to the conspirators as outlined above (Tr. 912-936). In addition, Pearson testified that in July of 1973 he met Guerra in a clothing store in the Bronx where they discussed the possibility of their buying and selling narcotics. Guerra told Pearson that he had cocaine available and in mid-July of 1973

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* When Roberto got out of Guida's car he showed agent Muniz a field test vial which had turned blue indicating the presence of cocaine (Tr. 1174).

Guerra sold Pearson an ounce of cocaine for $1,000 (Tr. 1006-1008). Shortly after this, Guerra told Pearson that he had a man downtown who owed him money and whom he wanted to get restarted in the narcotics trade and that he, Guerra, needed heroin for him. Pearson, at Guerra's request, obtained an eighth of a kilogram from John DiSalvo,* which Pearson sold to Guerra for $3,500 in Guerra's Bronx apartment. Guerra later complained to Pearson that the package of heroin was short in weight (Tr. 1008-1010).

Guerra on one occasion told Pearson that Rossi and Coralluzzo were wild, that he was not making any money with them and that they owed him $30,000 for previous cocaine transactions. He also told Pearson that he had a connection for cocaine in California (Tr. 1010-1012, 1093-1094).

In August of 1973, in Guerra's Bronx apartment, Guerra told Pearson that he did not have any cocaine on hand and that he would appreciate it if Pearson could obtain some so that Guerra could provide it to a customer and thereby retain the latter for future transactions. Pearson went to the High Hat Bar and obtained a half kilogram of cocaine on consignment from defendant Gerald Rubin, which Pearson delivered that night to Guerra's customer in the Ninth Circle Bar in Manhattan. The customer refused to accept the cocaine because of its poor quality and high price. Pearson returned the cocaine to Rubin and later went to Guerra's house and complained to Guerra about the customer's refusal to buy the cocaine. Guerra promised to make it up to Pearson (Tr. 1012-1015). Shortly after this Guerra told Pearson that defendants Capotorto, Louis Lepore and Robert Browning had gone downtown and

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* DiSalvo, an unindicted co-conspirator, had been a customer of Rossi's and had introduced Rossi to Coralluzzo (Tr. 160-165).

"ripped off" this same customer for $12,000 and that he, Guerra, was being held responsible (Tr. 1016-1018).*

Pearson, after returning from Florida on the Flynn theft, was approached by Guerra who asked for another eighth of a kilogram of heroin. Pearson obtained the heroin from John DiSalvo and delivered it to Guerra at the TP Diner on Boston Post Road and, a week later, Guerra paid Pearson $5,000 in Guerra's Bronx apartment (Tr. 1018-1019). Guerra had told Pearson during this time that he had received a half kilogram of cocaine from Rossi and Coralluzzo as a payment on money that they owed to him. Pearson subsequently was trying to sell more cocaine to Peter Cosme, but was unable to reach Rossi or Coralluzzo. Believing that Guerra still had the half kilogram, Pearson approached Guerra and asked him for it. Guerra refused, telling Pearson that he already had a customer for the cocaine which was "stashed" in Connecticut (Tr. 1019-1020).**

Pearson also testified that he met Capotorto in the summer of 1973 and had seen him on three or four occasions during 1973 with Rossi (Tr. 1018-1022).

3. The Mengrone wiretap

Rossi testified that in late August or early September of 1973, he and co-conspirator Peter Mengrone met with Frank Lucas and agreed to sell Lucas a quantity of heroin. Shortly after that meeting Lucas gave Rossi and Mengrone approximately $30,000 for a kilogram and a half of heroin. Rossi testified that the money was "garbage", that is, fives

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* Pearson was later present in Rossi's house and overheard Rossi arguing on the telephone with Guerra's customer (Tr. 1016-1018).

** Guerra told Peter Mengrone that he was paying rent on "stashes" (S. App. 145).

and tens rather than the fifty and one hundred dollar bills much preferred by narcotics dealers. Rossi believed that Lucas would not be able to produce the originally agreed upon $300,000 and at this point he decided to keep the money without giving Lucas the heroin. Prior to the receipt of the money Rossi had informed Louis Lepore, Capotorto, Guerra, Browning, Pearson and others about the proposed heroin deal with Lucas. Some two or three days after he decided not to fulfill his part of the deal, he so informed Guerra. Guerra told Rossi to give back the money or supply the "goods". Rossi said he was not going to do either (Tr. 340-347, 675-699). Rossi also testified that Guerra was "very happy" about the Lucas heroin deal because they all were going to make a substantial amount of money (Tr. 697).

Out of the $30,000, Rossi gave Browning $1,000; Capotorto got $3,000-$4,000; and $8,000 was used to finance the trip to Florida for the theft of the Flynn cocaine (Tr. 340-347).

On August 20, 1973, the Westchester County District Attorney's Office placed a court authorized wiretap on Peter Mengrone's home telephone. Some 55 of those intercepted calls were received in evidence at trial and played for the jury (Tr. 1324-1403).* They covered the period from August 23, 1973 to October 10, 1973 and involved narcotics-related conversations between Peter Mengrone and nine of the defendants and co-conspirators: Louis Guerra, Albert Rossi, Ernest Coralluzzo, Louis Lepore, Robert Browning a/k/a Bobby Gooch, James Capotorto, Gerald Rubin, Charles Guida and Gary Pearson. The majority of the conversations related to events immediately preceding, during and after Rossi's "rip off" of co-conspirator Frank Lucas.

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* The transcripts of those calls are included in the defendants' Supplemental Appendix.

On September 1, 1973 Rossi asked Mengrone if the customer (Lucas) had the money and Mengrone told Rossi that it would be ready that night or the next day (S. App. 27). On September 5, 1973 Louis Lepore called Mengrone and asked for "Italian suits" (S. App. 31), and on September 5, 1973 Rossi and Mengrone arranged a meeting for that night (S. App. 32). On September 7, 1973 there were a series of conversations between Mengrone, Rossi, Coralluzzo, Browning and Capotorto regarding the Lucas transaction. By 8:00 p.m. on September 7, 1973, Rossi had apparently received the $30,000 from Lucas and Mengrone because at that time Louis Lepore told Mengrone that the money was "garbage" and not from any bank (S. App. 55, 56). On that same day, there were other calls from Louis Lepore and Browning obviously trying to reassure Mengrone, who had begun to worry that the transaction was not proceeding as originally planned.

On September 8, 1973 Mengrone called Louis Guerra to find out what was wrong. Mengrone told Guerra that the money was for a "key and a half". Guerra replied that he first found out about the deal the day before and assured Mengrone that the deal may not be dead and that the "30 is still good" (S. App. 59, 60-61).*

Later that same day Guerra called Mengrone and the two discussed Mengrone's problem. At one point Guerra told Mengrone: "You want to see thirty thou or a package equivalent to that" (S. App. 75, 76).

On September 9, 1973 Guerra and Mengrone had twelve telephone conversations, five of which were initiated by Guerra and the remainder by Mengrone (S. App. 85-88, 94-125). During those conversations Guerra assured Men-

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* Guerra also complained that the only time they call him is when there's trouble, when they held Big Jimmy [Capotorto] in a hotel (S. App. 61).

grone that he would get the $30,000 back (S. App. 94) and that this is "not the way to do business" (S. App. 102, 104). Guerra in a later conversation discussed the alternatives and stated—"I'll make him pull the one and one-half I get this . . . I'll give you one" (S. App. 107). At 7:30 on September 9th Guerra told Mengrone:

> . . . I think if he [Rossi] stops and gets Ernie [Coralluzzo] out of his brain he'll do it because we could earn if we take it . . . I told him to pull something anyway cause I could sell it all right.

Guerra continued:

> Then once I get my hands on, I could give you one and could sell the other one and make his profit (S. App. 112).

In another subsequent conversation on September 9, 1973 Guerra told Mengrone:

> I'm not even worried about the money . . . I'm in so deep over here . . . I just want to see things start to move . . . that's all . . . I'm stuck for over 30,000 already (S. App. 117).

Mengrone evidently became desperate and called Guerra, telling him that Lucas wanted a hostage until he got his money back (S. App. 119, 120).

At 11:41 a.m. on September 10, 1973, Guerra called Mengrone and they had the following conversation:

> Guerra: Oh good I been trying to get you a little while, er. Pete I got bad news, I got bad feelings I heard some stories and er I been beat and I think you've been beat.
>
> Mengrone: Go ahead.
>
> Guerra: I'm er, I'm, I'm blowing my stack, I haven't been able to reach them un I had it with them I'm

umm its er I'm, I'm out thirty thousand myself over the pass couple of weeks couple of months between er my other deals, and the grass and shit like that, I can't see them coming across with anything, I think they all lost their fucking minds, now the only reason I'm telling you this is this way you, you do what you gotta do you know like don't, no sense holding back don't quote me or anything like that, either, do me a favor because I got er I gotta work my own little thing or try and get my money back.

Mengrone: Right.

Guerra: Alright, like even that, that box we put in your car, that was my money.

Mengrone: Uh, huh.

Guerra: That was mine, they er I didn't see a nickel of that, I been paying rent in a couple of different places, the stashes, I been paying plane tickets back and forth I been loaning these guys money to party plus I got $11,000 which is suppose to go to Italy (inaud) somebody mentioned to me where I felt I been completely used, they made me see something that wasn't really what it was suppose to be and had me swearing to people, so er your step number one now is to do what you gotta do er er, step number two I'm reaching out to my old connections, I'm getting back with the people I was with, now if you still have any confidence in me and if you still around, that's not funny Pete I know, but if um you get straightened out I think you and I could do something make some money.
Mengrone: OK, question, what did you hear, just fill me in so I'll know what is going on (S. App. 145).

Mengrone asked Guerra how he could reach Rossi and Guerra stated:

> I can't, I can't give you a hint Pete, please, alright I'm, I'm doing more than I should right now but I think you deserve that much that plus I would like to do business with you when this mess straightens out and its like I say now, I don't know that it was pancake mix, I suspect, I was told somebody else thinks so but I couldn't swear to it you know, like if you put me up on a stand and said what was in there, I couldn't really tell you, I couldn't tell it was the real thing. I couldn't tell it wasn't real, all I know is I saw the packages, nice sealed neat packages (S. App. 147).

Guerra also complained that they owed him "a ton of money" and that he had been used (S. App. 145, 146, 148). A few minutes later Guerra again called Mengrone and complained how he had lost confidence and how he had put up a thousand here and $11,000 and $800 here and needed expense money and how this was another Frankie Matthews thing. He asked Mengrone to keep him out of it because "up to now I've been legitimate", and that "you get yourself straight, you get out of this alright and we'll make money—I still got some friends . . . (S. App. 152-154).

On September 25, 1973 the day after Rossi, Coralluzzo and the others returned after stealing the cocaine from Flynn, Browning told Mengrone that he had been in Florida (S. App. 223, 224), and later on the same day Coralluzzo told Mengrone that he could do something direct with the "girl" * and

> . . . I'm talking about something you ain't, nobody has ever seen up here, and I seen it with my own eyes, an the guy I getting it from is like my brother, alright (S. App. 233).

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* A code word for cocaine (Tr. 168).

4. The Festa-Camperlingo-Thompson meeting

Special Agent George Festa testified that on May 3, 1974 he spoke with Albert Rossi in the United States Attorney's office in New York. In agent Festa's presence Rossi dialed a number and then handed the phone to Festa who identified himself as "Guisep" to Joe, the person who answered the phone. Festa told Joe that he was Rossi's friend from New York. After a brief conversation Festa flew to Fort Lauderdale, Florida, where on the following day he called the same number and again spoke to "Joe". A meeting was arranged and at approximately 1 p.m. on May 4, 1974 Festa, accompanied by another undercover agent, met with defendants Joseph Camperlingo and Raymond Thompson in a parking lot outside the Four O'Clock Club in Fort Lauderdale. Before going to the meeting agent Festa had concealed a Kel machine in his car which transmitted the ensuing conversation to a receiver in another DEA car parked a short distance away (Tr. 1545-1547).

Agent Festa began the conversation by asking Camperlingo if he was aware that Festa had cocaine down South. Camperlingo said he was, but that he had been told it was 150 kilograms, which was a little unbelievable. Festa said it was only 15 kilograms and Camperlingo then described how he would get the cocaine into the United States but insisted on being a partner with Festa. Camperlingo then told Festa:

> You know he [Rossi] has a lot of . . . to ask me for a favor because he moved me around on a couple of deals that he shouldn't have moved me around on, understand? Now with his back against the wall he calls me and asks for a favor. How in all this I should tell him, hey Allie look forget about it you know what I mean? (App. 315).

Camperlingo and Thompson then spent most of their time detailing how they would bring Festa's non-existent cocaine into the country.

> Camperlingo: Here's what we do.
>
> Thompson: We'll bring it here.
>
> Camperlingo: We'll bring it here to you this is our business smuggling, we'll bring it here to you, understand, ah. Then you take your end go about your business and we'll go about our business (App. 316).

Camperlingo again told Festa:

> See we went through the same . . . with Allie, if it works good we can go further. Well his first shot didn't work good at all. You know what I mean? (App. 319).

Thompson further described the narcotics smuggling activity as follows:

> We go down there and we get it right . . . and we bring it up we keep our boat out . . . we run it out to our boat and we're on our way back. We bring it back out here to the Islands out here then we switch to a speed boat. We get about 50-60 miles an hour and we're home . . . we don't ah, we don't—around with Customs. But we have a guy in the Islands you know but very seldom uh—(App. 323).

Camperlingo later stated:

> And you're talking. I mean we're bringing in, we're bringing in thousands of pounds of grass, coke and—
>
> Festa: Coke and . . . grass bothers me. . .
>
> Thompson: —thousand pounds of grass on a boat— . . .
>
> Camperlingo:—Coke is nothing we put it in a watertight container if need to, we throw it over the fucken side with a fucken radio beam on it.

> Come back three or four days later and pick it up (App. 325-326).

At the conclusion of the conversation Festa said he would get in touch with Thompson.

Festa returned to New York and on May 9, 1975 spoke to Thompson who advised Festa that Camperlingo had left on his trip. Festa called Camperlingo that night and was told by Camperlingo that before doing any deals he wanted to have Festa checked out by an individual by the name of Angelo who was in New York. Camperlingo asked Festa for a phone number where Angelo could reach Festa. Festa stalled and told Camperlingo that he would call the next day with the number. When Festa finally reached Camperlingo Festa told him that the heat was on. Festa did not speak to Camperlingo or Thompson after that call (Tr. 1532-1544).

The Defense Case

1. James Angley

James Angley testified that he had never been arrested and had never been involved with narcotics. He and Coralluzzo became partners in a trucking business in 1973 and he met Albert Rossi in July of 1973 at a barbecue at Coralluzzo's house. Angley admitted going to Florida with Rossi, Coralluzzo, DeLuca and the others in September of 1973. He believed, however, that it was for pleasure only. He had no idea of the purpose of the trip until he arrived in Florida and as soon as he found out he immediately went back to New York. Angley denied ever receiving any cocaine for going on the trip. He admitted going to New Jersey on October 25 or 26, 1973, but insisted that it was to discuss the trucking business with Coralluzzo whom he knew to be a fugitive. Angley also admitted knowing Serrano, but again stated that it was a social relationship and that he never dealt in narcotics with

Serrano. Angley said that he sometimes ate at the Crosstown Diner with his wife. He further admitted driving Rossi and Coralluzzo to Riverdale on one occasion where they met Spangler and Marrero but denied that it had anything to do with narcotics. He admitted seeing Guerra, but said he had never met him. Angley also stated that in January of 1974 he and Coralluzzo went to Thomas Vasta's Bar in Long Island with their wives (Tr. 1847-1878).*

On cross-examination Angley said that he, Pearson, Browning, DeLuca, Lepore, Rossi and Coralluzzo were in a hotel room when he first heard that there was going to be a robbery, but he did not hear what or who was going to be robbed (Tr. 1879-1891).

Angley also called character witnesses, one of whom testified that agents attempted to arrest Angley's son, mistaking him for his father (Tr. 1921-1924).

2. James Capotorto

Capotorto called Vickie Rossi, Albert Rossi's wife, who testified that her husband was a liar and that Capotorto had beaten Albert Rossi after Capotorto found out that Rossi had tried to rape Rossi's wife's sister, whom Capotorto was dating. Vicki Rossi also testified that her husband hated Angley because Angley took Coralluzzo away from him (Tr. 1936-1957).

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* Rossi testified that Vasta, who was acquitted, approached him at his birthday party in October of 1973 and asked Rossi for two kilograms of cocaine which Rossi refused to supply (Tr. 252-254). Vasta had been negotiating with Special Agent DiGravio to sell five kilograms of cocaine which Vasta said was coming from "Ernie". Vasta also told DiGravio that the same person who was going to supply the cocaine could also supply heroin (Tr. 1197-1204).

Vasta's dealings with Rossi began at least as early as March of 1973 when they, together with Coralluzzo, stole 600 pounds of mannite, a cutting agent for narcotics, from a doctor, which they later sold for $6,000 (Tr. 181-183).

Dr. Thomas Peters testified that on May 25, 1973 he had Capotorto admitted to a Florida hospital for hepatitis and that Capotorto remained in the hospital until June 4, 1973. Following Capotorto's release Dr. Peters returned approximately six of Capotorto's calls over a two week period of time (Tr. 1957-1972; Capotorto's DX A).

Capotorto did not testify.

3. Other Defendants

Defendants Thompson, DeLuca, Camperlingo Bertolotti and Guerra did not testify or present any evidence.*

Lieutenant Joseph Greeley was called by defendant Crea and stated that in 1973 he was in charge of a state investigation involving Rossi, Coralluzzo and others, that he was also in charge of the Mengrone wiretap and that he was aware that Mengrone's son was never kidnapped (Tr. 1993).

ARGUMENT

POINT I

The evidence of appellants' membership in the conspiracy charged was more than sufficient.

Angley and DeLuca assert that in general the evidence was insufficient to convict them. Thompson, Capotorto and Camperlingo contend that the proof as against them showed only isolated acts insufficient to warrant a finding that they were members of the conspiracy. And Bertolotti and Camperlingo claim that the non-hearsay evidence of their membership in the conspiracy was insufficient to permit

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* Crea and Joseph Lepore, who were acquitted, both testified and admitted knowing Rossi but denied any involvement in narcotics (Tr. 2044-2073, 2108-2145).

the introduction against them of the hearsay statements of their alleged co-conspirators. The arguments are without foundation. Viewed in the light most favorable to the Government, the proof established the knowing participation of each appellant in the conspiracy charged.

1. Angley

Angley knowingly accompanied Rossi, Coralluzzo, Pearson, DeLuca and the others on their trip to Florida in September of 1973 for the intended purpose of stealing kilogram quantities of cocaine from Flynn (Tr. 192-215).* And even though he was not present at and did not participate in the actual theft itself, Angley later received three or four ounces of the Flynn cocaine from Rossi and Coralluzzo (Tr. 226). On October 26, 1973, Angley drove Rossi and Coralluzzo to the Bronx where they received a substantial portion of the Flynn cocaine from Cathy Spangler. He then drove Rossi and Coralluzzo to an apartment where the cocaine was stored overnight. Later, he transported that cocaine to Coralluzzo's brother-in-law, "Sally Goose", who had agreed to hold the cocaine (Tr. 254-261, 1411-1418). During the time Rossi and Coralluzzo were fugitives Angley, on at least two occasions, sold one-eighth kilogram quantities of the Flynn cocaine and turned over the proceeds to Rossi and Coralluzzo (Tr. 263-268). In addition, he sold ounce quantities of cocaine to John Serrano on approximately six occasions during 1973 (Tr. 1104-1106), and in December of 1973 agreed to sell two kilograms of cocaine to Serrano for $27,500 per kilogram. On December 10, 1973, Angley, under surveillance of DEA agents, sold Serrano an ounce sample of that cocaine for

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* In contrast, Angley testified he had gone to Florida, but denied knowing the purpose of the trip until after he arrived. He stated that when he did find out he immediately went home (Tr. 1857-1860, 1879-1891).

$1,000 (Tr. 1114-1117, 1151-1157, 1172; GX 1). Two days later Coralluzzo, together with Angley and DeLuca, approached Rossi. Coralluzzo informed Rossi that Angley had a customer for a kilogram of cocaine. Rossi after hearing the details refused to supply the cocaine. Coralluzzo, however, decided to do it on his own and he asked defendant Guida to deliver the narcotics. On December 12, 1973, Angley telephoned his customer, John Serrano, and told him that the cocaine would be delivered that night. Later that evening, pursuant to a signal from Angley, Serrano and a DEA informant entered a black Thunderbird belonging to Rossi and driven by Charles Guida where the informant checked the cocaine to be purchased. When the surveillance agents later attempted to arrest Guida and Serrano, Guida escaped taking the kilogram of cocaine to Rossi (Tr. 1119-1126). Given the foregoing, the evidence of Angley's guilt was not merely sufficient but overwhelming. *United States* v. *Barrera*, 486 F.2d 333, 337-338 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

2. DeLuca

The evidence presented by Rossi, Pearson and the defendant Angley clearly established DeLuca's central and important role in the conspiracy.*

DeLuca traveled to Florida and participated in the theft of the cocaine from Flynn and received $500 expense money after the robbery. After the group returned to New York, it was DeLuca, along with co-defendant Robert Browning, who took the luggage containing the twelve kilograms of cocaine from the airport to the Bronx where they turned it over to Rossi and Coralluzzo (Tr. 194-215,

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* DeLuca concedes that he "did go to Florida and had transactions with [his] co-defendants and co-conspirators," but insists that he was a " 'mere casual facilitator' and not a co-conspirator" (DeLuca's Br. p. 3).

913-933, 1857-1863, 1879-1892). As a fee for his part in the theft of the cocaine, DeLuca received $5,000, $2,000-$3,000 in cash and the remainder in cocaine (Tr. 223-226).

After Florida and in late September or early October 1973, DeLuca received a kilogram of cocaine from Rossi which he delivered to defendant Louis Lepore in the Bronx (Tr. 236-238). On a subsequent occasion DeLuca delivered for Rossi another one-quarter kilogram to co-conspirator "Carey", which he returned to Rossi, through a third person, after the sale to "Carey" was aborted (Tr. 280-286).

In December of 1973 DeLuca delivered two kilograms of cocaine to defendant Vincent Artuso in the Bronx. Artuso subsequently acknowledged receipt of the cocaine and made partial payments totaling $14,000 to Rossi and Coralluzzo (Tr. 303-306).

Thus, DeLuca delivered or had in his possession on different occasions during the course of the conspiracy a total of approximately fifteen and a half kilograms of cocaine which had been supplied to him by Rossi and Coralluzzo. To call such activities those of a mere "casual facilitator" is absurd.

3. Capotorto, Camperlingo, Thompson and Bertolotti

Capotorto's close association with the core members of the conspiracy dated from March or April, 1973, when he introduced Rossi and Coralluzzo to an individual by the name of Willard Williams, a/k/a "Trees". Through Williams, Rossi, Coralluzzo and Capotorto met co-conspirators Harold Harrison and Frank Matthews and agreed to sell to them a large amount of heroin. Matthews and Harrison later delivered to Rossi approximately $350,000, part of which Capotorto helped count.

Although initially intending to supply the heroin, Rossi and Coralluzzo, after receiving the money, decided not to supply the heroin but rather to steal the money. They later returned the money after discovering that Capotorto was being held hostage (Tr. 347-357, 1527-1530).*

In June of 1973, Capotorto, accompanied by Thompson, met with Rossi and Coralluzzo and told them that he, Thompson, Bertolotti and Camperlingo had pooled their money and had sent Thompson and himself to New York to buy a kilogram of cocaine. Subsequently, Rossi obtained two kilograms of cocaine from Guerra which he transferred to Capotorto and Thompson. Thompson sampled some of the cocaine, said, "It looks like the real thing," and handed Rossi $17,000-$19,000. Thompson and Capotorto agreed to take the second kilogram on consignment and returned with both kilograms to Florida (Tr. 170-175).

Later in June of 1973 Rossi and Coralluzzo met with Capotorto and Thompson in Florida in an attempt to collect the money still owed them for the two kilograms. Thompson there complained about the quality of cocaine, but nonetheless handed Rossi and Coralluzzo a further payment of $5,000 (Tr. 177-179). This and related matters occasioned three additional meetings in Florida in June, July and August of 1973.

At the first meeting held in Camperlingo's home and attended by Rossi, Coralluzzo and Capotorto and the rest of

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* Mengrone and Guerra discussed this on the Mengrone wiretap (S. App. 61, 150, 152). Capotorto's assertion that the Government "conceded" in its summation that the transaction was a ripoff from the beginning is totally false (Capotorto's Br. pp. 32-35). Rossi testified that he, Capotorto and Coralluzzo intended in the beginning to sell heroin to Matthews (Tr. 356). Furthermore, it is highly unlikely that Capotorto would have permitted Coralluzzo to proffer at the outset, as he did, Capotorto's availability as a hostage pending delivery of the heroin, had Capotorto known that no such heroin was ever going to be delivered (Tr. 347-348, 351-356).

the Florida contingent, Bertolotti, Camperlingo and Thompson repeated that they were having difficulty in reselling the cocaine they had received from Rossi in May or June because it was sniffing cocaine. The same three agreed to supply Rossi and Coralluzzo with 500-600 pounds of the marijuana they were to import and to deduct the price for the same from the amount they still owed for the cocaine (Tr. 321-325, 532-537).

Subsequently, at that meeting, in the presence of everyone but Thompson, Camperlingo and Bertolotti expressed additional concern for their investment in the apparently difficult to resell cocaine. And accordingly, they asked Rossi and Coralluzzo to supply them with a portion of any additional cocaine the latter received so that they could mix it with the cocaine they already had on hand (Tr. 325-326).

At another meeting in Camperlingo's Florida home in August of 1973, attended by Capotorto, Camperlingo, Bertolotti, Thompson, Rossi and others, they again discussed the problem of reselling the earlier supplied cocaine and the transportation of the marijuana to New York (Tr. 327-328).

After the marijuana had been taken to New York, a third meeting was held in New York attended by Camperlingo, Charles Guida, Capotorto and Rossi. Camperlingo told Rossi that he wanted payment for the marijuana. Later that same trip Camperlingo met with Coralluzzo, Rossi and Guerra in lower Manhattan, where Coralluzzo told Camperlingo that he would give him $2,000-$3,000 for the marijuana (Tr. 337-339, 532-537).

In August 1973, Capotorto, Rossi, Coralluzzo and Browning met with Angelo Iacono, Flynn's partner, in Florida. At that meeting Iacono stated that Flynn had South American connections for vast amounts of cocaine. Capotorto and Rossi later met with Flynn who confirmed that fact. In Capotorto's presence, Rossi agreed to take all the cocaine Flynn could supply.

Subsequently, Capotorto, Rossi and Guida met with Iacono when the latter came to New York with a sample of the cocaine Flynn was offering to sell (Tr. 184-192). And although Capotorto was not present during the actual theft of the cocaine, he and Thompson were fully aware of it (Tr. 553).*

Finally, in May of 1974, Camperlingo and Thompson met with Special Agent Festa in the belief that Festa, who was posing as a friend of Rossi's, had a large amount of cocaine which he needed smuggled into the country. Camperlingo and Thompson both agreed to the proposition and detailed how they had smuggled both cocaine and marijuana into the country. Camperlingo in that same conversation acknowledged previous deals with Rossi (Tr. 1545-1547; App. 312-326).

In light of the foregoing, Capotorto's claim that the evidence proved at most only that he participated in an isolated transaction without knowledge of the broader conspiracy is clearly frivolous. As for the similar claims of Camperlingo and Thompson, the evidence of their purchase of two kilograms of cocaine directly from the core operators was alone sufficient for the jury to infer that both were knowing participants in the larger conspiracy. *United States* v. *Agueci*, 310 F.2d 817, 836 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). The jury could properly have found that Camperlingo, Bertolotti, Thompson and Capotorto would not have amassed the $17,000-$19,000, and Thompson and Capo-

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* Flynn's wallet, which was found outside the rooms where the cocaine theft took place, contained a piece of paper with Capotorto's Florida telephone number (Tr. 1405-1459; GX 78, 79, 80; Capotorto's DX A). Capotorto was also involved with Rossi in what became the Lucas-Mengrone "rip-off" (Tr. 342-345; S. App. 255-256, 199-213).

torto would not have then traveled to New York, unless those individuals believed that they were dealing with persons who could readily supply large amounts of narcotics on short notice. The jury could properly have found, as apparently it did, that this Florida contingent believed in and relied upon the fact that it was dealing with a substantial narcotics organization which of necessity depended for its existence upon participation of many sources and customers in addition to themselves. As this Court said in *United States* v. *Ortega-Alvarez,* 506 F.2d 455 (2d Cir. 1974):

> "It is firmly settled in this Circuit that when large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wide-ranging venture, the success of which depends on the performances of others whose identities he may not even know." *Id.* at 457 (citations omitted).

Moreover, the jury had substantially more than simply the evidence of the two kilogram purchase from which to conclude that Camperlingo, Thompson and Bertolotti were knowing participants in the charged conspiracy. Most notably the jury heard evidence that each of the Florida group had attended meetings in Florida with Rossi and Coralluzzo, subsequent to the two kilogram purchase, and that there each either voiced or was present when others voiced complaints about their difficulty in reselling the cocaine because it could not be injected. And Camperlingo, among others, was present when Rossi was asked if he would supply them with additional cocaine to mix with the difficult to dispose of cocaine already on hand—evidence from which the jury could properly have found that these defendants knew they were but one link in a chain between their customers on one end and Rossi and Coralluzzo with their sources and their customers on the other. See *United States* v. *Bynum,* 485 F.2d 490, 495-497 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 903 (1974); *United States* v. *Vega,* 458 F.2d 1234, 1236 (2d Cir. 1972), *cert. denied, as Guridi* v. *United States,* 410 U.S. 982 (1973).

Finally, substantial proof of the knowing participation of Thompson and Camperlingo in the charged conspiracy was provided by the evidence of their statements and admissions to agent Festa that in the past they had smuggled "thousands of pounds of grass and coke into the country" (App. 325-326), and had participated in drug transactions with Rossi, who clearly was well known to them.

Clearly, there was sufficient evidence for the jury to find that Camperlingo, Thompson, Capotorto and Bertolotti each had knowledge of the broad conspiracy. *United States* v. *DeNoia,* 451 F.2d 979, 981 (2d Cir. 1971).

The claim by Camperlingo and Bertolotti that the hearsay declarations of their co-conspirators were improperly received because the Government failed to demonstrate by a fair preponderance of the independent evidence that each was a knowing participant in the criminal venture, *United States* v. *Geaney,* 417 F.2d 1116, 1120 (2d Cir.), *cert. denied as Lynch* v. *United States,* 397 U.S. 1028 (1969), clearly must fall in light of the foregoing discussion. In addition to Camperlingo's admissions to Festa, as noted above, both Camperlingo and Bertolotti were present at the three meetings in Camperlingo's Florida home where they acknowledged receipt of the cocaine from New York, complained about its quality and agreed to give Rossi and Coralluzzo marijuana in partial payment for what was due on the cocaine (Tr. 321-325, 532-537). During one meeting *both* told Rossi "that they had laid out a lot of money for the cocaine" and asked if Rossi would get them additional cocaine to mix with what they had (Tr. 325-326). That evidence was more than sufficient to meet the Government's burden under *Geaney.* See *United States* v. *Mallah,* 503 F.2d 971, 975-976 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. (March 19, 1975); *United States* v. *Calabro,* 449 F.2d 885, 889-891 (2d Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972).

POINT II

The jury properly found a single conspiracy among the defendants and their co-conspirators to traffick in narcotics.

All of the defendants except DeLuca urge the reversal of their convictions on the grounds that the proof at trial established the existence of multiple conspiracies rather than the single conspiracy charged in the indictment. Four of the defendants, Camperlingo, Thompson, Angley and DeLuca, contend that the trial court erred in not granting severances, while Bertolotti, Camperlingo and Capotorto also argue the Court gave improper instructions to the jury on the issue of multiple conspiracies. The arguments are factually and legally unsupportable.

1. Single Conspiracy:

The evidence at trial clearly established the existence of but one conspiracy consisting of suppliers, middlemen and customers whose common purpose was the distribution of large amounts of narcotics "into the hands of the ultimate purchasers". *United States* v. *Agueci, supra,* 310 F.2d at 826.

Defendants Guerra and Flynn supplied the core operators, Rossi and Coralluzzo and their aides and workers, with more than 16 kilograms of cocaine, which Rossi and Coralluzzo then distributed to their numerous customers through the efforts of a group of core workers, including appellants DeLuca and Angley and their co-defendants Guida, Browning, Louis Lepore, Marrero, Greco, Spangler and co-conspirator Gary Pearson. Each of those workers performed various service functions for the core operators, including delivering (Angley, DeLuca, Guida, Marrero and Pearson) and storing and transporting (Spangler and

Greco) the narcotics. The customers included appellants Capotorto, Camperlingo, Bertolotti, Thompson and Guerra, as well as their co-conspirators Rubin, Cosme and Serrano. The evidence makes clear that each of the complaining appellants—all of whom dealt directly with the core operators in supplying, buying or distributing multikilogram quantities of cocaine—was aware that he was a participant in a large scale scheme designed to place narcotics in the hands of their ultimate users. *United States* v. *Rich*, 262 F.2d 415, 418 (2d Cir. 1959).

Thus, during the relatively short period of the conspiracy Guerra delivered a total of four kilograms of cocaine to Rossi and Coralluzzo and on one of those occasions was told by Rossi that the customers for the narcotics had come from Florida. It is clear beyond dispute that Guerra was aware that the conspiracy did not end with Rossi and Coralluzzo, his immediate buyers. Among other things, Guerra, with Capotorto and others, helped transport and later took possession of part of the 500-600 pounds of marijuana transferred to Rossi and Coralluzzo by Thompson, Bertolotti and Camperlingo in part payment of the cocaine they had purchased; and Guerra attended a meeting among Rossi, Coralluzzo and Camperlingo to discuss payment for part of that marijuana. Moreover, Guerra paid Rossi and Coralluzzo $10,000 for a kilogram of the cocaine the latter had supplied, which was part of 12 kilograms they had robbed in Florida from Flynn; and Guerra was later approached by Pearson who wanted a half kilogram of that cocaine. In addition, in 1973 Guerra sold cocaine to Pearson and purchased heroin from him (Tr. 1008-1019). He also told Pearson and later Mengrone that Rossi and Coralluzzo owed him $30,000 from cocaine transactions (Tr. 1093-94; S. App. 145, 117). Guerra, along with his co-conspirators Capotorto, Rossi, Coralluzzo, Louis Lepore, Browning, Rubin and Guida were intercepted on the Mengrone wiretap as each talked to Mengrone regarding the aborted heroin transaction with Lucas, indicating con-

clusively that each was associated with the others and each was aware of the respective participation and roles of the others in the conspiracy to distribute narcotics (S. App. 59, 60-61, 75-76, 85-88, 94, 102, 104, 107, 112). Guerra in addition made admissions to Mengrone on the wiretap regarding his awareness of the Matthews affair, (*supra*, pp. 6-8) and his loss of 30,000 on other deals.

Angley and DeLuca accompanied Rossi, Coralluzzo and the others on the trip to Florida and Angley, during 1973, sold cocaine to Serrano on six occasions. He later offered to sell Serrano two kilograms of cocaine at $27,500 per kilogram. Angley obtained a kilogram from Coralluzzo which was transported by Guida to Serrano. Angley also assisted in distributing part of the Flynn cocaine during the period of time Rossi and Coralluzzo were fugitives.

DeLuca participated in the theft of the 12 kilograms of cocaine from Flynn, and he and Browning later transported the cocaine from Kennedy airport to the Bronx. And DeLuca subsequently delivered a total of three and a half kilograms of cocaine to Rossi and Coralluzzo's customers, including Louis Lepore, Carey and Artuso.

Capotorto, along with Rossi and Coralluzzo, participated in the Matthews transaction for which he later was held hostage. He was intercepted on the Mengrone wiretap as he and Rossi jointly tried to soothe the agitated Mengrone after Rossi had taken Lucas for $30,000, $3,000-$4,000 of which Capotorto received from Rossi. Capotorto and Thompson were also entrusted with $17,000-$19,000 by Camperlingo and Bertolotti and sent to New York to purchase a kilogram of cocaine from Rossi and Coralluzzo. Capotorto and Thompson and eventually Camperlingo and Bertolotti instead purchased both kilograms delivered to Rossi by Guerra. Capotorto subsequently partook in numerous discussions, along with Thompson, Bertolotti and Camperlingo, regarding the balance due Rossi and

Coralluzzo for those two kilograms. Capotorto also participated in the early negotiations with Flynn, whom he knew—a fact corroborated by the presence of his telephone number found in Flynn's wallet. Camperlingo and Thompson in May of 1974 confirmed their association with Rossi by meeting with special agent Festa, who proffered himself as an associate of Rossi's from New York. Camperlingo at that meeting acknowledged his earlier dealings with Rossi as he and Thompson detailed their cocaine smuggling activities in an attempt to have Agent Festa employ their services in return for a share in the cocaine he supposedly had.

In the oft-cited passage from *United States* v. *Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939) this Court, in describing the parameters of the classic "chain" conspiracy, stated:

> "the conspirators at one end of the chain knew that the unlawful business would not, and could, not stop with their buyers: and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependant upon the success of the whole."

Applying those standards here, the jury could properly have found, under correct instructions, that the evidence disclosed but a single "vertically integrated loose knit combination" designed to distribute narcotics, *United States* v. *Bynum*, *supra*, 485 F.2d at 495; *United States* v. *Agueci*, *supra*, and found that each of the seven appellants must necessarily have been aware that he was participating in such a single conspiracy in which there were numerous

suppliers to and purchasers from the core group. *United States* v. *Sperling*, 506 F.2d 1323, 1340-1341 (2d Cir. 1974); *United States* v. *Ortega-Alvarez*, *supra*; *United States* v. *Sisca*, 503 F.2d 1337, 1345 (2d Cir. 1974); *United States* v. *Mallah*, 503 F.2d *supra*, at 973-974; *United States* v. *Bynum*, *supra* 485 F.2d at 495-497; *United States* v. *Cirillo*, 468 F.2d 1233, 1238-1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).*

Appellants' reliance on this Court's admonition in *United States* v. *Sperling*, *supra*, is misplaced. There,

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* Some of appellants argue that each of the incidents involving Rossi and, respectively, Lucas-Mengrone, Harrison-Mathews and Samuels, in which Rossi "ripped-off" money from those prospective narcotics customers, was a separate conspiracy wholly distinct from any to which they arguably could be said to have been members. The arguments are in error and ignore the plain fact that each such incident occurred during the life of the alleged conspiracy and began as a genuine transaction for the sale of narcotics from the core group to the respective customer. As such, each such proposed transaction was in furtherance and part of the broader conspiracy to distribute narcotics to which each appellant and the core group were parties. Moreover, apart from whether these incidents were in furtherance of the conspiracy charged, evidence of each, as well as of the robbery of mannita—a cutting agent for cocaine—was properly admitted to prove the existence, purpose, structure and operation of that conspiracy and the association of numerous of the conspirators and appellants in illicit drug activities. See *United States* v. *Torres*, Dkt. 75- (2d Cir. July 2, 1975); *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973). Thus, for example, the evidence complained of showed that of the $30,000 taken from Lucas, Rossi gave $3,000-$4,000 to Capotorto and used $8,000 to finance the Florida robbery of the Flynn cocaine; that Capotorto was also a direct participant in the proposed sale to Harrison-Mathews; and that Guerra was a principal participant in and an expectant beneficiary of the fruits of the Samuels and Lucas-Mengrone transactions, respectively.

although finding a single conspiracy between the Pacelli group and the Sperling Group, this Court noted:

> While there is clear evidence of drug sales between Pacelli and Sperling, the ties among the members of each group were much stronger than the ties between the two organizations. It would have been much wiser for the Government to have tried the appellants in two separate actions, one incorporating those linked with the Pacelli group and the other incorporating those linked with Sperling. Except for Lipsky, there was no common witness against members of both groups. *United States* v. *Sperling, supra,* 506 F.2d at 1340-1341 n. 25.

The division suggested in *Sperling,* or anything like it, was not possible here. The appellants were inextricably linked with each other and with their co-conspirators and the Government without any viable alternative quite properly placed them together in the single conspiracy their narcotics activities so justly warranted. Thus, for example, Guerra was the source of the two kilograms of cocaine purchased from Rossi and Coralluzzo by Capotorto, Thompson, Bertolotti and Camperlingo. Yet later he was a customer for one kilogram of cocaine sold to him by Rossi and Coralluzzo after they, with the participation of Pearson and DeLuca and the knowledge of Angley, Thompson and Capotorto, had robbed it from Flynn (Tr. 553-554). And Guerra and Capotorto had helped transport and distribute the 500-600 pounds of marijuana tendered by the Florida customers as an offset to the price of the cocaine they had purchased.

Capotorto and Thompson were close associates of both Camperlingo and Bertolotti and, at the same time, Capotorto was deeply involved in both the Lucas-Mengrone and Harrison-Matthews transactions. Furthermore, as the testimony of Pearson showed, Capotorto on one occasion "ripped off" one of Guerra's customers (Tr. 1016-1018).

Finally, none of appellants has demonstrated any prejudice of the kind which would necessitate reversal even assuming a variance between the conspiracy charged and what appellants claim was proved at trial. *United States* v. *Sperling, supra,* 506 F.2d at 1341; *United States* v. *Agueci, supra,* 310 F.2d at 826.

2. Severance

In view of the evidence establishing the existence of a single conspiracy, the trial court did not abuse its discretion in refusing to grant severances to the complaining defendants. *United States* v. *Bynum, supra,* 485 F.2d at 497. *United States* v. *Cassino,* 467 F.2d 610, 628 (2d Cir. 1972), *cert. denied,* 410 U.S. 928 (1973).

The established rule in this Circuit is that a defendant

> must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one, and that a trial Court's refusal to grant a severance will rarely be disturbed on appeal. *United States* v. *Borelli,* 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied,* 401 U.S. 946 (1971).

The claims of prejudicial spill-over resulting from the length of the trial, the volume of evidence against other defendants, limited involvement in the conspiracy, conflicting defenses,* and proof of other crimes during the course

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* Camperlingo's reliance on *United States* v. *Barrera,* 486 F.2d 333, 339 (2d Cir. 1973) *cert. denied,* 416 U.S. 940 (1974), in support of his claim that the trial erred in not granting him a severance in the face of Angley's supposed antagonistic defense, is misplaced. In *Barrera* this Court refused to find that the trial court had abused its discretion in denying severances to two co-defendants where counsel for a third, non-testifying defendant, in accordance with his client's defense of insanity, conceded throughout that his client was involved with the co-defendants in the narcotics conspiracy charged. Here Angley testified, denied knowing Camperlingo or being involved in narcotics, and was available for cross-examination. Under those circumstances Camperlingo was not entitled to a severance. *United States* v. *Silvers,* 425 F.2d 707 (5th Cir. 1970).

of the conspiracy have no validity whatever, especially in light of the jury's verdict acquitting eight co-defendants. *United States* v. *Bynum, supra,* 485 F.2d at 497; *United States* v. *Vega, supra,* 458 F.2d at 1236; *United States* v. *Aviles,* 274 F.2d 179 (2d Cir.), *cert. denied,* 362 U.S. 974 (1960); *United States* v. *Jenkins,* 496 F.2d 57 (2d Cir. 1974).

3. The Charge

In response to defendants' assertions at trial that the Government's evidence established several discrete and independent conspiracies, the trial court instructed the jury in part that:

> Proof of several separate and independent conspiracies is not proof of the single overall conspiracy as charged in the indictment and if you find that the Government has failed to prove the existence of only one overall conspiracy you must find the defendants not guilty (Tr. 2746).

Several of appellants' claim that this is the "all or nothing" language condemned in *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964), *cert. denied* as *Mogavero* v. *United States,* 379 U.S. 960 (1965); *United States* v. *Kelly,* 349 F.2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966), and accordingly that reversal of their convictions is mandated. The argument is unsound.

In *Borelli* this Court held that "where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the Court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants." 336 F.2d at 386 n. 4. In *Kelly* this Court strongly suggested that in multi-defendant conspiracy cases the jury be instructed to take due regard of the fact that the proof against the various defendants may differ. 349 F.2d at 757.

Judge Carter's instructions to the jury carefully followed those admonitions. Immediately after the complained of portion set out above, the jury was told that:

> No defendant may be convicted under Count 1 unless you find beyond a reasonable doubt that he was a member of the conspiracy charged in Count 1. If you find that a conspiracy existed beyond a reasonable doubt, then you must consider the second element of the conspiracy Count, that is, whether the Government has established beyond a reasonable doubt that the defendant whose guilt or innocence you are considering knowingly and wilfully became a participant in the conspiracy with knowledge of its alleged criminal purpose (Tr. 2748-2749).
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> * * * * *
>
> To conclude that a defendant was a member of a conspiracy, you must find that he knew the unlawful purpose of the alleged conspiracy, that knowing the purpose he intentionally joined in the endeavor, and that he had an interest in making it succeed. It is not necessary, however, that you find that each conspirator was fully informed as to the details of the full scope of the conspiracy, or participated in every aspect of the conspiracy. A person becomes a member of the conspiracy by associating himself with a common plan or scheme, knowing the central aim or principal purpose of that common plan or scheme and intending to help bring about its success (Tr. 2749-2750).

Judge Carter then carefully marshalled the evidence and the contentions of the parties. At the conclusion he again told the jury.

> First I must emphasize again that there are 17 defendants on trial here and as to each Count you must consider separately whether the specific defen-

dants charged in that Count have been proved guilty beyond a reasonable doubt.

It is your duty to give separate, personal consideration to the case of each defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual leaving out of consideration entirely any evidence admitted solely with regard to other defendants. Each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him. The fact that you may find one or more of the accused guilty or not guilty on any particular count should not influence your verdict with respect to the other defendants or with respect to any other Count (Tr. 2777-2778).

If the jury had believed from these instructions that they were required to convict all or none of the defendants it follows that they would have done so. That they did not, makes it undeniably clear that it was not an "all or nothing" charge but one which was proper in all respects. *United States* v. *Sperling, supra,* 506 F.2d at 1341; *United States* v. *Bynum, supra,* 485 F.2d at 498; *United States* v. *Sisca, supra,* 503 F.2d at 1345.

POINT III

The trial court properly admitted evidence of Various Related Marijuana, Cocaine and Heroin transactions.

Bertolotti, Camperlingo and Guerra contend that the District Court committed reversible error in admitting evidence of other drug dealings assertedly not charged in the indictment. Specifically, Bertolotti complains that the admission of evidence relating to marijuana dealings

among the co-conspirators was error and prejudicial since it was the only evidence of drug dealings involving him.* Camperlingo on the other hand concedes the admissibility of the evidence relating to these marijuana transactions but argues that evidence of other drug transactions as detailed by him on the Festa tape recording should have been excluded. Guerra objects to the marijuana transactions as being unrelated to the cocaine-heroin conspiracy. He also argues that testimony by Pearson of cocaine, heroin and marijuana deals with him was unrelated to the conspiracy charged, highly prejudicial and its admission therefore reversible error. The contentions lack merit.

Concededly the indictment does not charge a marijuana conspiracy. And the District Court was careful to instruct the jury that it could not return a verdict of guilty if it found only a conspiracy to traffick in marijuana (A. 83-A. 85). The evidence of marijuana dealings was relevant and admissible, however, because those dealings were part and parcel of the conspiracy to distribute cocaine.

The transactions complained of occurred during the life of the conspiracy alleged. In June of 1973 Rossi and Coralluzzo met in Florida with Capotorto, Camperlingo, Bertolotti and Thompson. The 500 to 600 pounds of marijuana that were transferred to the Rossi-Coralluzzo group and then transported to New York were given in partial payment for the cocaine that previously had been delivered from Guerra through Rossi and Coralluzzo to the Florida group. A significant portion of this marijuana load made its way back to Guerra who then consigned some of it to Gary Pearson. On these facts it can hardly be said that

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* This contention ignores the hearsay statement by Capotorto to Rossi that Bertolotti was one of the Florida group which had pooled money to buy the Guerra cocaine and the testimony by Rossi that Bertolotti participated in several discussions in Florida and complained about the poor quality of the Guerra cocaine.

the marijuana transactions were unrelated to the crimes charged and were offered solely to prove the bad character of the defendants. If Bertolotti and his Florida associates had chosen to pay in cash the remainder of what they owed for the cocaine, the Government surely would have been entitled to prove the fact and circumstances of that payment. The fact that they chose instead to barter marijuana for the cocaine is similarly admissible as evidence which is directly probative of the conspiracy charged. Moreover, the evidence of marijuana dealings sheds light on the structure and organization of a larger conspiracy to deal in illicit drugs of which the conspiracy to deal in cocaine and heroin was a part. It has consistently been held that such evidence is highly probative and should be admitted. *United States* v. *Papadakis,* 510 F.2d 287 (2d Cir. 1975); *United States* v. *Mallah, supra,* 503 F.2d at 980-81; *United States* v. *Stolzenburg,* 493 F.2d 53 (2d Cir. 1974); *United States* v. *Garelle,* 438 F.2d 366, 368-69 (2d Cir. 1970), *cert. dismissed,* 401 U.S. 967 (1971); *United States* v. *Stadter,* 336 F.2d 326 (2d Cir. 1964), *cert. denied,* 380 U.S. 945 (1965).

Bertolotti's reliance on *United States* v. *Brettholz,* 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied* as *Santiago* v. *United States,* 415 U.S. 976 (1974) and *United States* v. *Falley,* 489 F.2d 33 (2d Cir. 1973) is misplaced. In *Brettholz* this Court merely sustained the District Court's discretionary exclusion of marijuana exhibits on defendant's motion below in the face of defendant's contradictory argument on appeal that the evidence should have been admitted. In *Falley* the suitcase of hashish and various drug paraphernalia which were admitted at trial had nothing to do with the two complaining appellants or the charges against them. This Court concluded that the purpose for introducing the suitcase of hashish was solely and improperly to get tangible evidence of drugs—any drugs—before the jury. *United States* v. *Falley, supra* at 37. This much is clear from the Court's opinion in *United States* v. *Stolzenburg, supra,* which approved the admission into evidence of the same

suitcase of hashish against a third defendant to whom the suitcase did have a relation as proof of a prior similar act.

Likewise the evidence of drug dealings as described by Camperlingo and Thompson on the Festa tape were properly admitted. This evidence corroborated Rossi's testimony that he had dealt with Camperlingo and his Florida associates; that Camperlingo was able to and did import significant amounts of marijuana as payment for cocaine; and that he and Thompson were traffickers in illicit drugs. Further, the Festa tape recording, made in early May of 1974 some six weeks before the filing of the indictment, demonstrates that Camperlingo and Thompson were not innocent bystanders at the earlier meetings with Rossi, Coralluzzo, Capotorto, and Bertolotti. The admission into evidence of the tape recording was proper since the Government was entitled to anticipate and neutralize a possible defense that these men were present but did not participate in the drug deals. See *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973), *cert. denied*, 417 U.S. 930 (1974); *United States* v. *Wright*, 466 F.2d 1256, 1258 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States* v. *Deaton*, 381 F.2d 114, 118 n. 3 (2d Cir. 1967).

Camperlingo argues in error that these other drug deals are not probative on the drug conspiracy charged because they took place *after* rather than before the conspiracy period. The case law, however, makes no such distinction between prior and subsequent similar act proof. *United States* v. *Papadakis*, *supra* (evidence of drug busts before, during and after the conspiracy period); *United States* v. *Mallah*, *supra* (evidence of drug paraphernalia seized six days after the filing of the indictment and end of the conspiracy); *United States* v. *Warren*, 453 F.2d 738, 745 (2d Cir. 1972) (evidence of drugs seized 1 day after the indictment and end of the conspiracy); *United States* v. *Knohl*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967) (evidence of statements made by defendant concerning additional illegal securities two months after the offense charged

in the indictment); *Hill* v. *United States*, 363 F.2d 176, 180 (5th Cir. 1966) (evidence of conversation with accountant two months after filing false tax return). The Festa tape recording was made in May 1974, over a month before the filing of the indictment. The numerous drug transactions described by Camperlingo and Thompson were obviously committed sometime before that date and depict a pattern of conduct that is consistent with and related to their conduct during the conspiracy period. The jury was instructed concerning the limited purpose of the evidence and its application only to Camperlingo and Thompson (Tr. 1534).

Guerra's contention that the evidence of his numerous drug dealings with Gary Pearson was unrelated to the conspiracy charged is far fetched. Those drug deals were an integral part of that conspiracy and probative of the existence and purpose. They took place during July through October of 1973 and involved numerous named co-conspirators. By early July of 1973 when Guerra supplied Pearson with his first one ounce package of cocaine, Pearson had already been introduced to Rossi, and Guerra had been supplying Rossi and Coralluzzo with cocaine.* The second cocaine transaction between Guerra and Pearson is even more demonstrative of the conspiracy. At Guerra's request Pearson obtained a half kilogram package of cocaine from co-conspirator Jerry Rubin for sale to one of Guerra's customers at the Ninth Circle Bar. Because of the customer's complaints no sale was made and the package was returned to Rubin. Guerra, to his subsequent regret, apparently then

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* Pearson testified that Guerra himself had alluded to the fact that Rossi and Coralluzzo were "cowboys" and that he was losing money on his dealings with them (Tr. 1010). During August of 1973 Guerra told Pearson that Rossi and Coralluzzo owed him $30,000 as a result of previous cocaine deals (Tr. 1093-94). Indeed, after the Florida trip in September of 1973 Guerra told Pearson he was given a half kilogram of cocaine in posted payment of the money still owed him by Rossi and Coralluzzo (Tr. 1019-20).

turned to co-conspirators Capotorto, Browning and Guida to satisfy the customer. As related to Pearson by Guerra a few days later, Capotorto, Browning and Guida went down to the Ninth Circle and instead of supplying the cocaine "ripped-off" the customer. When Pearson visited Rossi soon thereafter he overheard Rossi telling a spokesman for the Ninth Circle customer that they had no intention of giving the customer his money back (Tr. 1012-18).

Similarly, the marijuana and heroin deals between Pearson and Guerra were conducted in the context of the conspiracy charged in the indictment. It seems clear that the marijuana supplied by Guerra to Pearson was part of the same marijuana shipped up from Florida in exchange for the Guerra cocaine. The heroin which Pearson sold to Guerra both times came from co-conspirator Johnny Di Salvo. Given these facts, Guerra's claim that his numerous drug transactions with Pearson were "side-deals" wholly independent and unrelated to the conspiracy charged is absurd. One has only to imagine what his argument would be if the Government were to seek an indictment charging the Pearson-Guerra "side-deals" as the basis of a separate conspiracy. Considering this Court's admonition in *United States* v. *Mallah*, 503 F.2d, *supra*, at 984-985, a claim of double jeopardy would be far more compelling than the separate and distinct conspiracy contention advanced here.

POINT IV

The Mengrone tapes were properly admitted into evidence and there was no prosecutorial misconduct nor any error in the court's marshalling of the evidence.

Guerra, Camperlingo and Angley argue that the trial court committed reversible error in permitting the introduction of the conversations obtained as a result of a court-ordered wiretap on the telephone of co-conspirator Peter Mengrone.* They also charge the prosecution with misconduct in offering the tapes and Guerra in addition alleges that prosecutorial tactics deprived him of a fair trial and that the trial court improperly marshalled the evidence as to him. The charges are unfounded.

1. The fruits of the Mengrone wiretap were properly admitted into evidence.

As seen above, pp. 23-28, *infra*, the Government offered into evidence some 55 taped telephone conversations between co-conspirator Peter Mengrone and nine of the co-defendants and co-conspirators.** A great many of those conversations were in furtherance of the conspiracy charged and all were probative of that conspiracy. Approximately 23 of those conversations were between Mengrone and Guerra. *All* of the conversations were narcotics related and took place between August 23, 1973 and October 10, 1973, the very middle of the conspiracy.

Rossi, prior to the introduction of the conversations, testified that in late August of 1973 he and Mengrone

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* Camperlingo and Angley were not parties to any of the intercepted conversations.

** Guerra, Coralluzzo, Rossi, Louis Lepore, Browning, Capotorto, Rubin, Guida and Pearson.

negotiated with co-conspirator Frank Lucas for the sale of a large amount of heroin, but that when he received only $29,000-$30,000 Rossi "ripped off" Mengrone (Tr. 340-347, 675-700). Rossi consistently testified that originally he had intended to sell heroin to Lucas; that Guerra, among others, was aware of the deal; and that "Guerra was very happy that a deal was going to be consummated with heroin due to the fact that we all were going to make a nice substantial amount of money" (Tr. 697). Rossi also testified that either one, two or three days after he received Lucas' money he told Guerra that he was not going through with the transaction. Guerra, at that time, told him either to give the money back or to give Lucas the "goods", which Rossi refused to do (Tr. 345-347).

Of the 23 Guerra-Mengrone conversations 15 took place before Guerra told Mengrone, on September 10, 1973, that the latter had been "ripped off". Of those 15 calls two were made on September 8, 1973: twelve took place on September 9, 1973 and the last one at 1:00 a.m. on September 10, 1973 (S. App. 59, 75, 85, 94, 98, 100, 102, 106, 112, 114, 116, 119, 122, 124, 257). During those 15 calls Guerra asserted his knowledge of the Lucas transaction, continually assuring Mengrone that the deal was going to come off. Guerra in those calls stated, among other things, that: he had just heard about the deal "yesterday" (September 7, 1973); "the 30 is still good" (S. App. 60); "Ernie didn't want to pull any goods" (S. App. 61); "Al is breaking his hump to get this thing together" (S. App. 62); Mengrone wanted "to see thirty thou or a package equivalent to that" (S. App. 76, 77); "there's not gonna be a rip off" (S. App. 79); that "Rossi was putting together some things" (S. App. 85); they all were going to make out if Rossi "pulls this" (S. App. 87); Rossi was going to "pull the goods" and that he would "rather" pull the one and a half cause we could move that (S. App. 106); he wanted "to see things start to move" and was stuck for over 30,000 already" (S. App. 117); he had

heard from Louis Lepore (S. App. 124); Rossi had told him that the money was intact and that the "key will be tomorrow" (S. App. 259); and that he was unable to reach the guy in California (S. App. 266).*

On September 10, 1973, Guerra called Mengrone to inform him that "I been beat and I think you've been beat" (S. App. 145). Guerra went on to tell Mengrone "I had it with them I'm out thirty thousand myself over the past couple of weeks, couple of months between my other deals and the grass and shit like that," and that he had been "paying rent in a couple of different places, the stashes" (S. App. 145).**

Guerra also told Mengrone that he was "reaching out to his old connections" and that after Mengrone got straightened out he and Mengrone "could do something to make some money" (S. App. 145, 147). A few minutes later on September 10 Guerra called Mengrone again to express his dismay about the "ripoff" and to complain that he put up "a thousand here, eleven thousand there and nine hundred here," and that he and Mengrone would make money (S. App. 150, 154). During the seven conversations after this, Guerra said he did not like "bad moves because nobody will let you make good moves" (S. App. 167), and that "he was waiting for this to clear up and then I'll start you know . . . (S. App. 268). During

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* Guerra had told Rossi and Coralluzzo that he was receiving cocaine from California (Tr. 175-176). He also told Pearson that he had a connection for cocaine in California (Tr. 1010-1012, 1093-1094).

** Pearson testified prior to this that Guerra had told him that Rossi and Coralluzzo owed him $30,000 for previous cocaine transactions he had had with them (Tr. 1010-1012, 1093-1094). Rossi had testified that Guerra had told him that he could not deliver cocaine the same day because he could not get to his "stash" (Tr. 170-175) and Guerra also mentioned his "stash" in conversation with Pearson (Tr. 1019-1020).

the last call on October 10, 1973 Mengrone asked Guerra for a "pound of tea" and Guerra told Mengrone that he would give him two. Mengrone also told Guerra that he had his "nephew visiting him, the seven year old, ya know, the kid is worth thirty-one ya know" (S. App. 272).*

Further, the Florida robbery of the Flynn cocaine was corroborated by two calls of September 25, 1973. In the first, defendant Browning, a/k/a "Gooch", told Mengrone that he had been in Florida. Coralluzzo, later that same day, told Mengrone he could do something with the "girl", a code word for cocaine (Tr. 168).**

The conversations, then, revealed Guerra's close association and deep involvement with Rossi, Coralluzzo and the other members of the conspiracy. They served to illustrate the existence, nature and purpose of the conspiracy charged, and far from being improper and prejudicial proof of other crimes, the conversations, except for a few isolated instances, were concerned solely with narcotics, the subject of the very crime with which defendants were charged. The fact that what had started out as narcotics sale involving a major number of the conspirators later evolved into a "rip-off" did not lessen the probative value of those conversations. Indeed had the transaction not being a "legitimate" one from the outset the conversations would still have been admissible as probative of the existence and purpose of the conspiracy. Irrespective of the intent of any of the parties to the conversations, the fact is that Rossi used $8,000 of the $30,000 he had taken from Lucas and Mengrone to finance the trip to Florida later

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* This obviously referred to the price of a quantity of heroin (Tr. 168).

* Both calls occurred the day after Rossi, Coralluzzo, Browning and the others had returned from Florida with the twelve kilograms of pure cocaine they had robbed from Flynn (Tr. 206-213).

that same month, where Rossi and six others, five of whom were on the wiretap, robbed Flynn of twelve kilograms of cocaine.* *United States* v. *Bynum, supra,* 485 F.2d at 498-499; *United States* v. *Arroyo,* 494 F.2d 1316 (2d Cir. 1974); *United States* v. *Santana,* 503 F.2d 710, 716-717 (2d Cir. 1974). *Cf. United States* v. *Nathan,* 476 F.2d 456, 459-460 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973). See also *Lutwak* v. *United States,* 344 U.S. 604, 615-618 (1953); *United States* v. *Bennett,* 409 F.2d 888, 893 (2d Cir.), *cert. denied* as *Haywood* v. *United States,* 396 U.S. 852 (1969); *United States* v. *Garelle, supra; United States* v. *Armone,* 363 F.2d 385 (2d Cir.), *cert. denied,* 385 U.S. 957 (1966).

Guerra did not testify nor present any evidence at trial yet his attorney told the trial court and now tells this Court that Guerra's part in the Lucas transaction was a "sham" and that the tape conversations were therefore not in furtherance of any narcotics conspiracy but evidenced rather a grand larceny (Guerra Br., p. 44). Unsuccessful below in preventing the introduction of the taped conversations, Guerra's attorney argued in summation that "not one real conversation occurred on the wiretap" (Tr. 2448), that "the only real drug dealers were Lucas and Mengrone" and that "the whole transaction was ripoff from the beginning" (Tr. 2456). Numerous pages in summation were spent in projecting what was claimed to be Guerra's state of mind during the phone calls with Mengrone, namely that everything Guerra said was a lie designed solely to obtain money from Mengrone. In support of that proposition, Guerra's attorney offered to the jury, as "proof," the very same allegations he now contends evidenced the misconduct of the prosecutor, *i.e.* the fact that Mengrone's son was not really kidnapped (Tr. 2448); that Rossi had Lepore and Browning call Mengrone (Tr. 2447, 2460); that Coralluzzo did not owe

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* Rossi, Coralluzzo, Pearson, Browning, Louis Lepore.

Rossi 67,000 (Tr. 2473); that Coralluzzo and Rossi were not feuding (Tr. 2474-2475); that Rossi did not owe Guerra $30,000; and that Rossi did not have drugs or a source for the narcotics (Tr. 2450-2451) (Guerra Br., p. 44).

Guerra however, neglects to mention that the uncontroverted evidence at trial established that Rossi and Coralluzzo owed Guerra money for the two kilograms given to Caportorto, Thompson, Camperlingo and Bertolotti; that Guerra told Pearson that Rossi and Coralluzzo owed him $30,000, (the same figure *Guerra* mentioned on the wiretap); that Rossi testified that Coralluzzo owed him money, but did not remember if it was $67,000; that Rossi had an available source for heroin; and that Rossi testified that Guerra was not immediately aware that it was a "ripoff".

Guerra argues that since Mengrone lied to Guerra about the kidnapping, then of necessity Guerra must have been lying to Mengrone. The logic is faulty. What Mengrone said or did to get his money back was totally irrelevant to Guerra's state of mind during his conversations with Mengrone and no amount of distortion and unfounded assertion can alter that fact.*

Indeed, it is clear that prior to September 10, 1973 Guerra was doing his utmost to make certain that the Lucas transaction was consummated—a fact evidenced by the 15 telephone conversations Guerra had with Mengrone, during a day and a half, all of which pertained to only that transaction. If the purpose was to get more money from Mengrone, as Guerra now claims, there would have been no

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* Guerra's supposition that the fake kidnapping somehow prejudiced him is unfounded for Guerra was sympathetic to Mengrone and offered to help him. In any event the jury knew that there was no kidnapping.

reason for Guerra, after only a day and a half, to have told Mengrone that it was a "ripoff". The argument is absurd, as the jury could have readily determined. The evidence showed that Guerra told Mengrone when he did because that was when Guerra in fact discovered that it was not going to be a narcotics transaction. Prior to that Guerra's only interest was in assuring the success of a lucrative narcotics transaction. This conclusion is buttressed by the fact that when Guerra learned and told Mengrone that it was a "ripoff", Guerra also revealed to Mengrone his loss of $30,000 on other deals, that he was paying rent on his "stashes" and that he had seen what he believed was pancake flour, facts all corroborated by the Government's witnesses.

The evidence then clearly established that during those 15 telephone calls prior to September 10, 1973, Guerra's intention was not grand larceny but the distribution of narcotics. His attempts now to prove the inverse, by offering as evidence the fact that the prosecutor did not question Rossi about the wiretaps is patently absurd. Every argument now made on appeal was made to the jury, including the fact that Mengrone's son was not in fact kidnapped and that Rossi told Lepore and Browning to call Mengrone and put him off.* Guerra's remaining arguments in support of his claim are completely unsupported by the evidence.

2. Guerra's other claims of prosecutorial misconduct are equally unfounded.

Guerra in addition charges the Government with using "tactics and strategems" calculated to deprive him of a fair trial. Stripped of its rhetoric and numerous irrelevancies, Guerra relies on the following specific instances in support of the charge: (a) the decision to indict and try Guerra on a conspiracy charge along with numerous co-

* The trial court, moreover, set forth the defense position on the tapes in its charge to the jury. (Tr. 2777).

defendants; (b) the failure of the Government to provide a list of additional overt acts; (c) the failure to provide 3500 material well in advance of trial; (d) the withholding of the "Pearson letter" until requested during the course of cross-examination; and (e) the failure to turn over a handwritten note made by a DEA agent until requested by the defense during the course of Rossi's cross-examination. Neither Guerra nor any other defendant was denied a fair trial as a result of this litany of supposed strategems.

The logic, necessity and propriety of charging the defendants under a conspiracy count are set forth in detail in Point II of the Government's brief. The fact that Congress, in passing the Comprehensive Drug Abuse Prevention Act of 1970, chose to include conspiracy to violate the narcotics laws as a separate indictable offense is sufficient answer to Guerra's expression of distaste for conspiracy charges. 21 U.S.C. § 846. As for the Government's failure to detail additional overt acts in a bill of particulars there was clearly no obligation for it to do so. The mistaken belief of Guerra's counsel that the Government had contended at a pre-trial conference that there were no overt acts other than those listed in the indictment hardly reflects on the cunning of the prosecution. The Government merely stated that as to the overt act element it was required to prove in order to prove the charge of conspiracy, it would rely on the overt acts pleaded. Counsel's failure to grasp the significance of the Government's predictable response to a request for a listing of additional overt acts (Tr. Oct. 3, 1974, pp. 12-13) did not entitle defendants thereafter to have excluded all evidence not relating to the overt acts set forth in the indictment, and Judge Carter properly so held.*

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* Whether to grant a request for a bill of particulars is, of course, a matter left to the broad discretion of the trial judge. *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). In some instances requests to state additional overt acts in a bill of particulars have been denied. See e.g.

[Footnote continued on following page]

The indictment stated in clear language that the period of the conspiracy extended from January 1, 1973 until the filing of the indictment (June 18, 1974). Thus, Guerra and his attorney were on notice that any drug dealings among the co-conspirators during that period were likely to be part of the Government's case at trial. Since Pearson was named as a co-conspirator and not a defendant in the bill of particulars it is difficult to believe that Guerra was caught off guard by Pearson's testimony concerning his drug dealings with Guerra during the summer and fall of 1973.

Similarly Guerra's other claims that the Government failed to produce documents and information as required are without merit. The Government supplied each defense counsel with the bulk of applicable 3500 material during the week preceding the trial. As a general rule the remainder of the 3500 material was turned over before the witness involved took the stand. The rule requires no more; indeed, it requires far less. 18 U.S.C. § 3500(a); *United States* v. *Leeds*, 457 F.2d 857, 859 (2d Cir. 1972); *United States* v. *Covello*, 410 F.2d 536, 543-44 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969). The Government's failure to produce certain handwritten notes of statements attributed to Rossi and made by DEA agents until requested by the first defense counsel to cross-examine Rossi * did not result in any prejudice to the defense. *United States* v. *Gottlieb*, 493 F.2d 987 (2d Cir. 1974). The notes were turned over as soon as they were requested (Tr. 511-12) and defense counsel cross-examined Rossi on their contents (Tr. 707-710).

United States v. *Iannelli*, 53 F.R.D. 482 (S.D.N.Y. 1971); *United States* v. *Calegro DeLutro*, 309 F. Supp. 462 (S.D.N.Y. 1970). In other cases they have been granted. See e.g. *United States* v. *Dioguardi*, 332 F. Supp. 7 (S.D.N.Y. 1971); *United States* v. *Agnello*, 367 F. Supp. 444 (E.D.N.Y. 1973).

* There was no showing that Rossi had ever seen the contents of the handwritten notes, let alone that he had adopted them (Tr. 462-463).

So, too, the Pearson letter was given to defense counsel while Pearson was still on the witness stand and he was examined at length about it (Tr. 1095-1102). The Government's conclusion that this letter did not constitute *Brady* material is not surprising in view of the limited value Guerra's counsel claims for it.* The short and dispositive answer is that the letter was given to the defense and they were able to cross-examine Pearson on its contents. Guerra's argument that the Government was trying to hide unfavorable information about its witnesses is belied by Rossi's direct examination wherein the Government elicited that Rossi had committed numerous serious crimes, such as an attempted murder, that he had confessed to an alleged murder which confession was known only to the Government, that he had committed other damaging acts for which there was no record. In addition the Government produced damaging psychiatric reports pertaining to Rossi dating back to 1969, and other impeaching material (Tr. 154-157, 357-362).

3. The Trial Court properly marshalled the evidence.

Guerra also claims that the trial court's marshalling of the evidence was improper in that it was a clear distortion of his defense. Guerra in addition alleges error in the court's instructions on the Mengrone wiretap.

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* Guerra claims here that the letter exposed Pearson "as someone other than the rational, calm, lucid man who appeared on the witness stand" (Guerra Br., p. 31). A reading of the one-page letter (A 311) and the transcript of Pearson's cross-examination on the subject (Tr. 1097-1102) reveal that Pearson was merely suggesting means by which he might be able to cooperate safely with law enforcement agencies, none of which was ever carried out.

In *United States* v. *Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963) this Court stated that:

> "[a]n appellate court reviewing such a summary [of the evidence] not only must consider it as a whole but must place it in the setting created by the jury's hearing of the evidence and the summations of counsel."

Guerra's attorney in summation told the jury that Rossi went to the federal government and wove "tales, dashes of truth, cups of lies, trying to make out drug deals . . ." (Tr. 2443). In talking about the marijuana paid for the cocaine. Guerra's counsel stated:

> "[i]t was a ripoff, another ripoff. But he made it up. He made up some prior transaction to pretend to be a drug dealer. He says he received it in payment for the cocaine . . .
>
> "It never happened. The marijuana was a ripoff, like they all were ripoffs . . .
>
> "He makes up drugs deals because the federal government isn't interested in a bunch of local robberies, grand larcenies, frauds. He is no drug dealer." (Tr. 2446)

Guerra's counsel continued:

> "He [Rossi] never had a source. He was stealing money and pretending he would deliver." (Tr. 2455)

and that Rossi's transactions with Lucas and Matthews:

> "are all robberies and he's [Rossi] got to make himself to be a drug dealer. Otherwise they got no use for him." (Tr. 2487)
>
> "Did he bring the cocaine himself to Florida? I don't think so. There was no cocaine. Another armed robbery. Pretending. . . . Its another attempt

> to make himself out to be a drug dealer" (Tr. 2488). "Isn't this a case of a series of Rossi's armed robberies, the half-crazed little Caeser, not a conspiracy to possess and distribute drugs, a series of armed robberies of Albert Rossi? . . . The Samuels ripoff, another attempt to make himself out to be a drug dealer when there was no drugs" (Tr. 2489).

In view of his counsel's trial tactics and summation Guerra can now hardly fault Judge Carter for stating that Guerra contended that "all of Rossi's testimony about drug dealing is false" and that all of Rossi's testimony is false" (Tr. 2777) when that was precisely an accurate statement of Guerra's contention at trial.*

Guerra's counsel also argued in his summation that *all* the conversations on the wiretap were false and were concerned with a ripoff of money and that no narcotics were ever transferred (Tr. 2448, 2458). Guerra now complains that the trial court, in its charge, inaccurately told the jury that defendants contended that the wiretapped conversations "related to something else, that it had nothing to do with narcotics . . ." (Tr. 2752). If that was a misstatement it was cured when Judge Carter told the jury that Guerra contended "that the wiretapped conversations which you heard do not involve any drugs but involve a robbery of

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* In marshalling the evidence Judge Carter also told the jury that:

> "The defendants all contend that the principal if not sole testimony implicating them is that of Albert Rossi. They contend that Rossi cannot be relied upon; that the testimony is laced with material inconsistencies and many lapses of memory especially under cross-examination; that he is an unstable person, a pathological liar, that he is prone to violence and criminality, that his past criminal record and wholesale deviant behavior underscore the fact that his testimony is not worthy of belief . . . (Tr. 2768)."

No objection was made to that formation.

Lucas, Matthews, and Peter Mengrone . . ." (Tr. 2777). That is precisely the interpretation given to that evidence by Guerra at trial (Guerra Br., p. 53-54).

Furthermore when those portions of the charge relating to the contentions of the defendants are read in their entirety and considered in the context of the trial court's warning that the jury's recollection controlled, it is clear that Judge Carter was eminently fair in marshalling the evidence and committed no abuse of discretion. See *United States* v. *Tourine*, 428 F.2d 865, 869, 870 (2d Cir. 1970), *cert. denied*, as *Burtman* v. *United States*, 400 U.S. 1020 (1971); *United States* v. *Dardi*, 330 F.2d 316, 330 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Kahaner*, *supra*.

POINT V

Bertolotti and Camperlingo's *Bruton* rights were not violated.

1. Bertolotti

After his meeting with Camperlingo and Thompson, Festa returned to New York where approximately a week later he telephoned Camperlingo. During their conversation Camperlingo told Festa that before doing any deals he wanted Festa to get together with an "Angelo", who Camperlingo said was a partner of his in New York at that time. Festa was then asked for a number where "Angelo" could reach him. Festa, however, never supplied any number (Tr. 1543-1545). Appellant Angelo Bertolotti now argues that the jury must have believed that he was the "Angelo" to whom Camperlingo had referred, thus violating his rights under *Bruton* v. *United States*, 391 U.S. 123 (1968). The argument lacks merit.

Although the trial court admitted Camperlingo and Thompson's statements to Agent Festa only as against

them, we respectfully suggest that the trial court's limitation was erroneously restrictive since these statements, proposing collective narcotics activities with Festa, who was thought to be a colleague of Rossi's, were in furtherance of the conspiracy charged and thus clearly admissible against all co-conspirators, including Bertolotti. *United States* v. *Frank*, 494 F.2d 145, 155-156 (2d Cir.), *cert. denied*, — U.S. — (1974); *United States* v. *Bennett*, *supra*, 409 F.2d at 893-894.

In any event, it is highly doubtful whether Camperlingo's statement to Festa that "Angelo" was going to check him out could in any manner have inculpated Bertolotti.* The jury might well have believed that the "Angelo" to whom Camperlingo had referred was someone other than Bertolotti (ho resided not in New York, but in Florida), such as defendant Angelo Iacono, who was from New York and had known and met with Rossi and Camperlingo's associate, Capotorto, in Florida. See *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971).

Moreover, the conclusion that no one in the trial courtroom, including the jury, attached any special significance to the passing reference to "Angelo" is strengthened by the fact that no *Bruton* objection was made by Bertolotti's counsel below to the reference complained of here for the first time.

Furthermore, there was ample other evidence against Bertolotti, and the complained of isolated reference to an "Angelo" was in no way "vital" to the government's case or "devastating" to Bertolotti.** See generally, *United*

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* The name "Angelo" was not mentioned during Agent Festa's meeting with Camperlingo and Thompson in Florida (Tr. 153-1543; App. 312-326).

** No mention was made of this reference during the Government's summation.

States ex rel Stanbridge v. *Zelker*, 514 F.2d 45, 48 (2d Cir. 1975). In addition, any possible prejudice occasioned by the passing reference to an "Angelo" was more than adequately cured by Judge Carter's admonition that the conversations were to be considered only against Camperlingo and Thompson and not against any other defendant (Tr. 1534). *United States ex rel. Nelson* v. *Follette, supra; Wapnick* v. *United States*, 406 F.2d 741 (2d Cir. 1969).

2. Camperlingo

Special Agent Lough testified that during the post arrest arraignment he asked Joseph Lepore what he was doing with a crowd like Coralluzzo and Guerra, to which Lepore replied: "Because I'm stupid that's why" (Tr. 2178). Camperlingo now contends that his *Bruton* rights were also violated by this statement. The argument is frivolous inasmuch as the statement did not inculpate Camperlingo. Furthermore, Joseph Lepore testified on his own behalf and denied knowing Camperlingo or making the statement to Agent Lough and was available for cross-examination (Tr. 2096-2146). In addition, there was no objection on *Bruton* grounds * and the trial court instructed the jury that the statement could be considered by them solely on the issue of Joseph Lepore's credibility (Tr. 2144). Under these circumstances the admission of Joseph Lepore's statement was proper. *United States* v. *Sperling, supra*, 506 F.2d at 1339 n. 22; *Nelson* v. *O'Neil*, 402 U.S. 622, 629-630 (1971); *United States* v. *Zane*, 495 F.2d 683, 694 (2d Cir. 1974), *cert. denied*, 419 U.S. 895 (1975).

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* An objection on *Bruton* grounds was made earlier but withdrawn when it was established that Joseph Lepore was going to testify (Tr. 2076-2089).

POINT VI

There was no improper restriction of Rossi's cross-examination.

Camperlingo contends that the trial court improperly restricted cross examination of Rossi on the question of his parents' involvement in his narcotics trafficking and on whether Rossi made a deal with the Government on their behalf (Camperlingo Br., p. 65-66). The contentions lack merit.

On cross-examination, after having testified that he kept drugs in his parents' house, Rossi was asked the following questions by defendant Cimmino's attorney:*

> Q. When the Federal Government approached you or you approached the Federal Government concerning your agreement to testify for them, was there talk about the prosecution of your mother and father in a drug conspiracy?
>
> Mr. Lavin: Objection
>
> The Court: I am going to sustain the objection. If you make the question more specific, I might allow it.
>
> Q. Did Mr. Lavin or did Mr. Lough or did Mr. Harris tell you that your mother and father were subject to a Federal narcotics conspiracy charge because there was a large quantity of drugs stored in their house?
>
> A. (Rossi): They didn't know.
>
> Q. There came a time that you told them you did?
>
> A. I never told anybody my business exactly. They knew I was doing something. They knew it wasn't legal. I didn't tell them it was drugs. They had an idea.

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* Paul Goldberger, Esq., who represents Camperlingo on this appeal represented Cimmino, who was acquitted, at trial.

Q. Did you tell Mr. Lavin, Mr. Harris or Mr. Lough or any other drug agent that you had been keeping drugs at the Narragansett Avenue Apartment?

A. I believe I did

. . . .

Q. Were you concerned, Mr. Rossi, about the possibilities of your mother and father being prosecuted as being part of a narcotics conspiracy?

A. No, I was not.

Q. There are people seated here in this courtroom who are being prosecuted for the storage of drugs. Weren't you concerned that your mother and father would be prosecuted for that?

Mr. Lavin: Objection

The Court: Objection sustained. (Tr. 436-438)

Rossi then admitted that he and others gave his mother and father money out of drug transactions and an objection to a question as to whether he was paying them money for storage of drugs was sustained.*

Camperlingo can hardly complain that cross examination of Rossi as to whether he made a deal with the Government to protect his mother and father was improperly restricted when that subject was simply never pursued by any defendant, including Camperlingo. There is no indication in the record that Judge Carter would have foreclosed an inquiry directed solely to that issue.** In any event the jury had abundant information from which to make a "discriminating appraisal" of Rossi's motives and bias to testify for the Government. *United States* v. *Campbell*, 426 F.2d 547, 550

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* Rossi's mother was 74 years of age and his father was 79 (Tr. 894).

** Indeed, if there had been such an agreement the Government of course would have been obligated to make it known. *Cf. United States* v. *Giglio*, 405 U.S. 150 (1972).

(2d Cir. 1970). Rossi stated that in addition to his plea of guilty to the federal indictment, he was currently under indictment in the Bronx and New York County State Courts for narcotics violations and that he could receive a sentence of up to life imprisonment on one of those charges. He stated he was aware that he would not be further prosecuted for any additional narcotics activities he revealed (Tr. 896-897). He acknowledged that he had been engaged in at least four armed robberies and one attempted murder and was a suspect in another murder (Tr. 144-146; 154-156), and that he had been involved in a transaction involving $650,000 of stolen securities. He further acknowledged that he was aware he could not receive immunity for any homicides or attempted homicides he might have been involved in (Tr. 357-362).

In view of the foregoing, it is clear that the trial court did not limit in any way Rossi's cross examination regarding the existence and nature of any agreements Rossi had with the Government, including any which might pertain to his parents' criminal liability. The trial court's exercise of discretion in limiting cross examination of Rossi on the underlying details of any supposed involvement of his parents was not error. *United States* v. *Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Kahn*, 472 F.2d 272, 279 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). *Cf. United States* v. *Turcotte*, Dkt. No. 74-2380 (2d Cir., April 17, 1975), slip. op. at 2967; *United States* v. *Coughlin*, Dkt. No. 74-2391 (2d Cir., April 15, 1975), slip op. at 2902-2903.

POINT VII

The District Court did not err in admitting the lost and found report and the Shell credit card receipts as business records.

Capotorto claims it was error to admit into evidence a lost and found report made and kept by the Hotel Diplomat in Hollywood, Florida (GX 78) and certain credit card receipts maintained by the Shell Oil Company (GX 118). The claim is without merit. Both exhibits were properly received under the business records exception to the hearsay rule. 28 U.S.C. § 1732(a).

The challenge to the lost and found report is twofold: *first*, that such reports do not pertain to the business of a hotel; and *second*, that the report lacks an inherent probability of trustworthiness in that it was written from information supplied to the head of the hotel's security section by a security officer who in turn had received the information from a maid who had found the wallet in question. Neither argument has merit. In order to run a hotel it is necessary and customary to keep records covering a wide range of activity, not just of rooms provided and meals served. Capotorto concedes that writings such as purchases, sales, deliveries, wage payments, bank deposits and the like qualify as hotel business records. But, he argues, because lost and found reports are not part of the predictable day-to-day operations of a hotel they do not qualify as business records (Capotorto Br., p. 38). This is far too narrow a view of the business records exception. It is applicable to any records of a business which are made as part of a routine. It was the routine of this hotel—and one would expect of any well run hotel—that when an employee came across a lost article he or she would turn it over to the Security Office whereupon a lost and found report would be filled out (Tr. 1463). *Palmer* v. *Hoffman*, 318 U.S. 109 (1934), relied on by Capotorto, is no authority for the proposition

that lost and found reports are not admissible as business records. There the Supreme Court found that a statement by an engineer to his superior in the railroad company concerning a recent accident was made in contemplation of litigation and therefore not inherently trustworthy. Decisions by this Court make it clear that if such reports of accidents are prepared in a routine manner and not for the purpose of litigation, they may be received in evidence as business records even though they are not part of the day-to-day operation of the business. *Pekelis* v. *Transcontinental and Western Air, Inc.*, 187 F.2d 122, 131 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951). *see also Gaussen* v. *United Fruit Company*, 412 F.2d 72 (2d Cir. 1969); *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1964). *Cf. Todgson* v. *Corning Glass Works*, 474 F.2d 226, 234 n. 10 (2d Cir. 1973), *aff'd*, 417 U.S. 188 (1974). Obviously, the purpose for completing the lost and found report was to facilitate its return to the rightful owner, not for use in any litigation.*

The report is inherently trustworthy. It was made on the day the wallet was found almost immediately after the information was communicated to the witness Marino, who was the Chief of the Security Office (Tr. 1464). The fact that the report was based on double hearsay—a maid's statement to Security Officer Jaddach who relayed the information to the witness Marino—is a matter which affects the weight of the evidence rather than its admissibility.** None of the participants was an idle bystander.

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* In the instant case, the lost and found report was offered only to prove the time when and location at which the wallet was found. The wallet itself and its contents were received in evidence (GX 78, 79, 80).

** There was no evidence before the jury that it was the maid who had found the wallet and turned it over to Security Officer Jaddach who then passed the information and the wallet on to Marino. That this is what happened appears from the contents of a written statement subsequently given by Marino to a DEA agent. For reasons best know to themselves defense counsel failed to ask any questions about the maid or the written statement either on voir dire or cross-examination (Tr. 1474-1475).

It certainly was the duty of all concerned as employees of the hotel to report the discovery of lost articles and to make a record of the fact. The possibility of error or dishonesty in reporting and recording the discovery of the wallet is too minimal to warrant excluding the document. *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 272 (2d Cir.), *cert. denied* 382 U.S. 878 (1965).

Capotorto's objection to the Shell credit card receipts is that they were not sufficiently identified as pertaining to him. They are conceded to be official business records of the gasoline company. The records were requested by the Government, transmitted by the company's central office in Tulsa, Oklahoma to a Shell employee in New York, and identified by him at trial (Tr. 1628). The witness, Nicholas Maggio, testified as to his familiarity with the record keeping procedures of the company (Tr. 1624-25). The supposed defect in his testimony which Capotorto has seized upon was his inability to correctly decipher the signature on the credit card receipts. He identified the signature as reading "James Caporto", "Capoiato", and "Capoidno" (Tr. 1632-33). This deficiency, such as it is, was cured by the introduction into evidence of a signature specimen stipulated to be that of defendant James Capotorto (GX 126). A comparison of the signatures on Government Exhibits 118 and 126 shows them to be identical and equally difficult to decipher. Since the Government had made out a prima facie case for the introduction of these credit card receipts as business records, it was up to the jury to determine the issue of authenticity. *United States* v. *Tellier*, 255 F.2d 441, 448 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958). In any event it cannot be said on the state of this record that the receipt in evidence of these rather neutral and undramatic credit card vouchers was prejudicial to Capotorto. They related to the marijuana trip from Florida to New York and were at best corroborative of Rossi's detailed testimony on the point.

POINT VIII

The sufficiency of the evidence in support of the indictment is not subject to attack.

Appellant Capotorto raises the wholly unsupported claim that the Grand Jury which returned the superseding indictment on which the defendants were tried (S. 75 Cr. 5) never gave consideration to the extensive testimony which had been presented in support of the superseded indictment (74 Cr. 620). Indeed, the gist of the argument made is that the new Grand Jury only heard and only considered three pages of testimony by Albert Rossi relating to Appellant Raymond Thompson, a defendant who had not been mentioned during Rossi's two earlier Grand Jury appearances. Contrary to the Capotorto claim the record establishes much more.

On January 6, 1975, Albert Rossi and Gary Pearson appeared before the Grand Jury which ultimately returned the superseding indictment.* Both witnesses identified transcripts of their earlier Grand Jury testimony as exhibits before the new Grand Jury.** They then proceeded to provide additional evidence to the new Grand Jury.

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* Pursuant to 18 U.S.C. § 3500, transcripts of this testimony and all prior Grand Jury testimony were provided to defense counsel. (GX 3503 id., 3503-A id., 3510 id., 3520 id.).

** GX 3503-A id. reads in part as follows:

* * * * *

Q. Are you the same Albert Rossi who appeared before a Grand Jury in this Court House on May 10, 1974 and June 7, 1974, in the matter of United States versus Ernest Coralluzzo, and others?

A. I am.

Q. Were you questioned by James Lavin at that time?

A. Yes, I was.

Q. I'm going to show you two Grand Jury Exhibits of today's date, Grand Jury Exhibit No. 1 and No. 2, and I'll ask you whether you've had an opportunity to review those two transcripts of testimony.

[Footnote continued on following page]

Thus the earlier testimony of Rossi and Pearson was before the Grand Jury which returned the superseding trial indictment. The claim that Rossi's prior Grand Jury testimony was not read to the Grand Jury that returned the superseding indictment (Capotorto Br., p. 28) is without any factual basis in the record and indeed appears to ignore the fact that complete transcripts of the prior testimony of both Rossi and Pearson were presented to the new Grand Jury as exhibits. Thus the rather labored argument that there was insufficient evidence in support of the indictment falls of its own weight.*

A. Yes, I did.

Q. And were these the answers that you gave to the Grand Jury reporter at that time when you testified?

A. Yes, they were. (App. 171)

GX 3520 id. reads in part as follows:

Q. Mr. Pearson, are you the same Gary Pearson who appeared before a Grand Jury in this Court House on June 6, 1974?

A. Yes, I am.

Q. And at that time were you questioned by Assistant United States Attorney James Lavin in the matter of United States versus Ernest Coralluzzo and others?

A. Yes, I was.

Q. I'm going to show you Grand Jury Exhibit No. 3, which is sitting immediately in front of you on the table, and ask you whether you've had an opportunity to review the Grand Jury Exhibit No. 3.

A. Yes, I did.

Q. And is that an accurate transcript of your testimony as given on June 6, 1974?

A. Yes, it's the same testimony that I gave on June 6, 1974.

* * * * *

* Capotorto's speculation that certain dates were changed in the superseding indictment at the whim of the Government without any proof in the record is baseless. The changes were few (three) and minor (Count 3—from October to November 1973; Count 4—from November to October 1973; Count 6—from October or Novem-

[Footnote continued on following page]

In any event there is no legal authority for this lame attempt to call the sufficiency of the evidence underlying the indictment into question. An indictment returned by a duly constituted grand jury is valid on its face and is enough to call for a trial of the charges on the merits.

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ber, 1973 to November, 1973). And the June 7, 1974 testimony of Rossi before the Grand Jury (GX 3503-A Id) with respect to each of these counts supports the version in both indictments since in each instance he testified that the transaction occurred either in October or November, 1973. (GX 3503-A Id; App. 159-161). The superseding indictment which the Government presented for consideration by the new Grand Jury reflects the dates supplied by the Government in its bill of particulars.

Capotorto also claims that the indictment charged that the conspiracy embraced dealings in heroin and marijuana as well as in cocaine. From his interpretation of the indictment Capotorto argues that the Grand Jury could not have given the indictment adequate consideration, since it had no evidence before it of any dealings in marijuana or heroin. However, the indictment did not charge that the conspiracy involved marijuana and made no specific reference to heroin, though it did charge a conspiracy to deal in both Schedule I and Schedule II narcotic drug controlled substances. Capotorto is entirely accurate that the heroin transactions proved at trial were not before the Grand Jury, though a conspiracy to traffick in Schedule II substances—cocaine—was amply demonstrated by the Grand Jury testimony. However, Capotorto's conclusion that the simple reference to Schedule I in the conspiracy charged by the Grand Jury establishes that the Grand Jury returned an indictment based on no evidence and abdicated its junction in considering the indictment is entirely unwarranted. The inclusion of a reference to Schedule I in the indictment was similarly not the product of any sinister prosecutorial purpose, since proof of the heroin transactions would have been admissible at trial without any reference to them in the conspiracy count, *United States* v. *Wright*, *supra* 466 F.2d at *United States* v. *Papadakis*, *supra*, and the Government's witnesses before the Grand Jury could have testified to heroin transactions, had they been asked, just as they did at trial. This variance was immaterial, *United States* v. *Wyler*, 487 F.2d 170, 172 (2d Cir. 1973), *United States* v. *Ramirez*, 482 F.2d 807, 816-817 (2d Cir.) *cert. denied* as *Gomez* v. *United States*, 414 F.2d 1070 (1973) and is in any event foreclosed to Capotorto by his failure to raise it below. Fed. R. Crim. P. 12(b)(2).

United States v. *Calandra*, 414 U.S. 338, 344-345 (1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *United States* v. *Wyler*, *supra*; *United States* v. *Ramsey*, 315 F.2d 199, 199-200 (2d Cir.), *cert. denied*, 375 U.S. 883 (1963). Capotorto makes no showing that the grand jury was either misled or imposed upon with the unnecessary use of hearsay testimony, *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972), and the transcripts of earlier grand jury testimony, given under oath, were authenticated by the witnesses whose testimony was recorded in them. *United States* v. *Rivera*, 513 F.2d 519, 525-527 (2d Cir. 1975); *United States* v. *DeSisto*, 329 F.2d 929, 933-934 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); *cf. United States* v. *Borelli*, *supra*, 336 F.2d at 390-391. Capotorto appears to base his claim largely on the fact that the Government failed to state, when asked, whether the prior Grand Jury testimony had been read to the new Grand Jury. However, the Government's obligation to disclose what had transpired before the Grand Jury was limited to furnishing applicable 3500 material. *Cf. United States* v. *Cramer*, 447 F.2d 210, 213 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).* The District Court was under no obligation to inquire further nor to grant the defendants' application for a hearing. *United States* v. *Peden*, 472 F.2d 583, 584 n. 4 (2d Cir. 1973); *United States* v. *Romano*, 330 F.2d 566, 571 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965). "[T]he burden of proving regularity [of Grand Jury proceedings] does not shift to the Government merely because defendant makes unsupported claims on a motion attacking the indictment." *United States* v. *Greenberg*, 204 F. Supp. 400, 402 (S.D.N.Y. 1962).

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* While we submit that it is of no significance to the proper resolution of the claim Capotorto makes, the fact is that the prior Grand Jury testimony was read to the Grand Jury that returned the superseding indictment, a matter which can be established by affidavit or sworn testimony on a remand, should the Court find it material.

POINT IX

The trial court did not commit error in its charge.

Relying on *United States* v. *Cangiano,* 491 F.2d 906 (2d Cir.), *cert. denied,* 419 U.S. 904 (1974), Capotorto and Camperlingo claim that the District Judge, in his instructions on the conspiracy count, failed to charge that the Government must establish a specific intent to violate the substantive narcotic laws and that therefore the judgments of conviction should be reversed. This contention is incorrect.

In defining the elements of conspiracy, the Judge underscored that the agreement must be

> "either to distribute or to possess with intent to distribute Schedule I and II narcotic controlled substances in violation of Section 841 and 812 of Title 21." (Tr. 2743)

He further charged that the Government had to prove that the agreement's "purpose was either to distribute or possess with intent to distribute either Schedule I or Schedule II controlled substances." *Id.**

With respect to the element of intent, the judge charged that the Government must establish

> "beyond a reasonable doubt that the defendant whose guilt or innocence you are considering *knowingly* and *wilfully* became a participant in the conspiracy with

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* The Court also read the applicable portions of the indictment which make clear that the defendants were charged with having "unlawfully, intentionally and knowingly . . . distribute[d] and possess[ed] with intent to distribute Schedule I and II narcotic drug controlled substances . . ." (Tr. 2742).

knowledge of *its* alleged criminal purpose." (Tr. 2749) (emphasis supplied)*

Thus, the trial judge's charge clearly required the jury to find a specific intent to distribute or possess with intent to distribute Schedule I and II narcotics.

The apparent basis for the present claim is the isolated statement—actually made during the course of the Court's instruction on the substantive counts **—that in making the determination of knowledge, wilfulness and intent, the jury "should presume that a person intends the natural and probable consequence of his acts". (Tr. 2737) *** However, this

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* Moreover, the Court cautioned that:

> [t]he charge in count 1 is that the defendants conspired to distribute cocaine and heroin. As a result, you may not find a defendant guilty merely because he conspired to distribute only some other illicit substance, that is, marijuana. (Tr. 2748)

The Court also charged that the following were insufficient by themselves to find the requisite intent: "association" with other alleged members of the conspiracy; "mere attendance at a meeting with co-conspirators; mere presence at the scene of the crime; mere knowledge of conspiratorial acts or objectives". (Tr. 2749-2749a.)

** The Court's charge on the conspiracy count contained the following oblique reference to this statement:

> "I have already explained to you that knowledge, wilfulness and intent exist in the mind, and told you how you are to determine whether the requisite knowledge, wilfulness and intent were present at the time in question" (Tr. 2751).

*** The full text of the challenged instruction reads as follows:

> "Knowledge, wilfulness and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have of arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge, wilful-

[Footnote continued on following page]

language does not fix what intent the jury must find but rather goes to the factors which the jury could consider in determining whether the requisite intent, properly charged elsewhere, had been proven. Thus, *Cangiano,* in which the trial judge improperly charged a standard for specific intent based on forseeability as an alternative to actual knowledge, is inapposite here, although even in *Cangiano* reversal was found unnecessary for reasons applicable *a fortiori* in this case. Of far greater pertinence here is *United States* v. *Barash*, 365 F.2d 395, 402-403 (2d Cir. 1966), which involved not the definition of specific intent but the manner in which that intent might be determined, and which did disapprove an instruction similar to that given here.* But see *McCarty* v. *United States,* 409 F.2d 793, 799-800 (10th Cir.), *cert. denied,* 396 U.S. 836 (1969); *United States* v. *Tijerina,* 407 F.2d 349, 355-356 (10th Cir.), *cert. denied,* 396 U.S. 843 (1969); *United States* v. *Wilkins,* 385 F.2d 465, 473-474 (4th Cir. 1967), *cert. denied,* 390 U.S. 951 (1968).

However, in *Barash* the vice of such an instruction was plainly far greater than here. Barash conceded the *acts* which made out the offense of bribery but disputed specific intent to influence official conduct, claiming that some of the payments were merely gifts and others the product of coercion. The effect of the challenged instruction in *Barash*, taken together with other statements in the charge,

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ness and intent were present at the time in question. In making this determination you should presume that a person intends the natural and probable consequences of his acts" (Tr. 2737).

* In *Barash* the District Court had charged:

"It is reasonable to infer that a person ordinarily intends the natural and probable consequence of acts knowingly done. So *unless the contrary appears from the evidence* you may draw an inference that the defendant intended the natural consequence which one standing in his circumstances and possessing his knowledge should reasonably have expected from any of his acts which he knowingly did." 365 F.2d at 402 (emphasis supplied).

was to improperly undercut that defense by suggesting that the payments themselves were sufficient proof of specific intent.

No such claim can be made here. In contrast to *Barash*, no defense depending on lack of specific intent to sell or distribute was made or could have been, *United States* v. *Jenkins*, 442 F.2d 429, 437-438 (5th Cir. 1971); *Helms* v. *United States*, 340 F.2d 15, 17-18 (5th Cir. 1964), *cert. denied*, 382 U.S. 814 (1965); *cf. United States* v. *Marin*, 513 F.2d 974, 977 (2d Cir. 1975); *United States* v. *Cangiano*, *supra*, 491 F.2d at 911; and a conspiracy to sell, distribute or possess a substantial amount of narcotics is a far less ambiguous index of specific intent than a payment is of intent to influence on Barash's version of the facts. Moreover, the language used by the District Court here could not, as it did in *Barash*, have had the effect of shifting the burden of proof to the defendants, for it lacked the language "unless the contrary appears from the evidence" which was included in the *Barash* charge. *E.g., Estes* v. *United States*, 335 F.2d 609, 616 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965). See *Mann* v. *United States*, 319 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964). Although it might have been preferable to omit the language relating to "natural and probable consequences", *see United States* v. *Bristol*, 473 F.2d 439, 444 n. 6 (5th Cir. 1973), the charge when viewed as a whole and as part of the entire trial, *e.g., United States* v. *Park*, 43 U.S.L.W. 4687, 4692 (June 9, 1975); *Cupp* v. *Naughton*, 414 U.S. 141, 146-7 (1973); *United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974); *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974); *United States* v. *Joly*, 493 F.2d 672 (2d Cir. 1974), cannot have resulted in any prejudice to the defendants, particularly since the requisite specific intent and knowledge and intent generally were otherwise properly and exhaustively defined. *United States* v. *Wilkinson*, 460 F.2d 725, 730-732 (5th Cir. 1972); *cf. United States* v. *Santana*, 485 F.2d 365, 371 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

POINT X

It was within the trial judge's discretion to permit the jurors to take notes into the jury room.

Defendants Angley and DeLuca claim that it was error to permit the jury to take notes into the jury room without prior court inspection. However, the very cases upon which the defendants rely support the proposition that it is within the trial judge's sound discretion whether or not to permit such note taking. *Harris* v. *United States,* 261 F.2d 792, 796 (9th Cir. 1958), *cert. denied,* 360 U.S. 933 (1959); *United States* v. *Carlisi,* 32 F. Supp. 479, 483 (E.D.N.Y. 1940). *See Toles* v. *United States,* 308 F.2d 590, 594 (9th Cir. 1962), *cert. denied,* 375 U.S. 836 (1963); *United States* v. *Murray,* 492 F.2d 178, 193 (9th Cir. 1973), *cert. denied,* 419 U.S. 942 (1974). Moreover, here the trial judge gave a cautionary instruction to the jury on the use of such notes (Tr. 2717-2718). Under such circumstances, it was clearly not an abuse of discretion to permit the use of notes as a memory aid.*

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* The defendants' reliance on *Paz* v. *United States,* 462 F.2d 740, 745 (5th Cir. 1972), *cert. denied,* 414 U.S. 820 (1973), is wholly misplaced. *Paz* involved a narcotics prosecution in which two books not in evidence concerning drug trafficking and drug problems were in the jury room during the course of the jury's deliberations. Here, the Court, in its discretion, merely permitted the jurors to take and use notes.

POINT XI

The Wharton Rule does not require the dismissal of the conspiracy count against DeLuca.

DeLuca for the first time on appeal contends that the Wharton Rule is a bar to his conviction under the conspiracy count. DeLuca was charged with conspiracy in Count One. Additionally he was charged in Count Two together with three other defendants—Coralluzzo, Browning and Louis Lepore—with distributing and possessing with intent to distribute twelve kilograms of cocaine. He was acquitted on the substantive count and convicted on the conspiracy count. His contention that he could only have been charged under the substantive count is frivolous.

The Wharton Rule is an intellectual curiosity which has been discussed with surprising frequency in the case law but has hardly ever been applied. The Rule derives from a section of Wharton's treatise on criminal law and procedure, the current version of which reads as follows:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." 1 Anderson, Wharton's Criminal Law and Procedure, § 89, p. 191 (1957).

The rule has no application to the narcotics charges in this case.* The crime of possession with intent to distribute may involve, but does not "require", the participation of more than one person. Furthermore, the conspiracy charge related to a course of dealings which transcended in time and scope the single transaction alleged

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* The classic examples of crimes where the Rule has some application are adultery, incest, dueling and bigamy.

in the substantive count. The conspiracy of which DeLuca was a part involved 29 other indicted co-conspirators and spanned the entire year of 1973. Further, there was testimony by Rossi that DeLuca was instrumental in arranging the sale and delivery of drugs to Louis Lepore and others *after* September 23, 1973, the date alleged in Count Two when DeLuca helped to transport the 12 kilograms of cocaine from the airport to Marilyn Greco's house. There was thus no "general congruence of the agreement and the completed substantive offense". *Iannelli* v. *United States*, 43 U.S.L.W. 4423, 4427 (March 25, 1975).

The Supreme Court's discussion of the extremely limited application of the Wharton rule in the recent case of *Iannelli* v. *United States, supra,* is dispositive of DeLuca's contention here. There, the Court upheld a conviction of conspiracy and a substantive violation of operating an illegal gambling business. The Court's preliminary discussion of the exceedingly narrow application of the Wharton Rule to federal statutory construction is sufficient, as noted above, to dispose of DeLuca's claim here. Further, the Court pointed out, 43 U.S.L.W. at 4428 n. 18, that, at most, the purpose of the Wharton Rule is "the avoidance of dual punishment" for a conspiracy and substantive offense that merge, a problem avoided by DeLuca's acquittal on the substantive count.

However, since Section 1955, unlike 21 U.S.C. § 841, requires a plurality of actors to commit the substantive crime, the Court in *Iannelli* proceeded to determine, by an analysis of the legislative history, whether Congress had intended a conviction for a substantive violation of Section 1955 to merge with a conviction for conspiracy to commit that crime.* In examining the legislative history

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* In so doing, the Court found it unnecessary, 43 U.S.L.W. at 4427 n. 15, to pass on the validity of the settled doctrine that when more than the plurality the statute requires for commission of the

[Footnote continued on following page]

of the Organized Crime Control Act, the Supreme Court in *Iannelli* found the following indicia of a Congressional intent to maintain conspiracy and the substantive offense of operating an illegal gambling business as separate and distinct offenses: the establishment of new and severe penalty provisions; the identification of certain "dangerous special offenders" for harsher sentencing treatment; the enactment of provisions to facilitate the discovery and proof of organized crime; and, a manifest awareness of the distinct nature of a conspiracy and the substantive offense that might constitute its immediate end. *United States* v. *Iannelli, supra,* at 4428-29. The Comprehensive Drug Abuse Prevention and Control Act, under which the charges here were brought, was enacted during the same year and manifests a similar Congressional intent to preserve the distinction between a conspiracy and substantive violations of the Act. The House Report defines the purpose of the bill in expansive terms:

> "This Legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States (1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs." 1970 U.S. Code Cong. & Admin. News at 4566, 4567.

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substantive offense participate in the conspiracy and substantive crime, the Wharton Rule is inapplicable. See *United States* v. *Frank,* Dkt. No. 74-2639 (2d Cir., June 27, 1975), slip op. at 4442-4443; *United States* v. *Becker,* 461 F.2d 230, 234 (2d Cir. 1972), *vacated and remanded on other grounds,* 417 U.S. 903 (1974); *United States* v. *Benter,* 457 F.2d 1174, 1178 (2d Cir. 1972), *cert. denied,* 409 U.S. 842 (1973). Given the large number of conspirators in this case, under this doctrine the Wharton Rule would be inapplicable here.

As in the Organized Crime Control Act the penalty provisions are new and severe. A special parole term was enacted to follow terms of imprisonment and repeat offenders were made subject to double the maximum penalties. 21 U.S.C. § 841(b). Harsher sentencing treatment was reserved for a category of "dangerous special offenders". 21 U.S.C. § 849. Further, the Act provides the Attorney General with the power to conduct hearings and issue subpoenas to facilitate enforcement of the Act, 21 U.S.C. §§ 875, 876, and provides statutory authority for the obtaining of search warrants under conditions frequently encountered in enforcement of the drug laws. 21 U.S.C. § 879. Finally, a specific statutory section defining conspiracy as a separate offense with separate penalties was included in the Act, 21 U.S.C. § 846, as was a separate offense, severely punishable, created to deal with those engaging in continuing and substantial criminal enterprises in narcotics involving five or more persons. 21 U.S.C. § 848.

Insofar as DeLuca's argument can be construed to challenge the inconsistency between his acquittal on the substantive count and his conviction for conspiracy, that argument has been rejected over and over again. *Dunn* v. *United States,* 284 U.S. 390 (1932); *United States* v. *Ortega-Alvarez, supra,* 506 F.2d at 457; *United States* v. *Zane, supra,* 495 F.2d at 690.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES P. LAVIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of July, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

(See attached List)

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

James P. Lavin

James P. Lavin

Sworn to before me this

10th day of July, 1975

Gloria Calabrese

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